PACIFIC & ORIENT INSURANCE CO BHD v. MAZLAN AHMAD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[ORIGINATING SUMMONS NO: 24NCC-137-04-2015]
29 SEPTEMBER 2015

JURISDICTION: *Courts – High Court – Whether one High Court has jurisdiction to set aside another High Court's perfected judgment – Whether only in rare and exceptional circumstances – Whether jurisdiction to set aside is statutory – Section 44 of Evidence Act 1950 – Whether particular mode of procedure prescribed – Whether final judgment could be set aside if proved to be null and void on ground of illegality or lack of jurisdiction*

CIVIL PROCEDURE: *Judgments and orders – Declaratory order – Declaratory order pertaining to insurer's statutory liability – Whether insurer legally bound to pay insured – Whether motor vehicle involved in accident was insured by insurer – Whether insurer had notice of liability suit within seven days after its commencement – Whether notice contained correct particulars of motor vehicle – Whether court has jurisdiction to grant declaratory order – Whether court has jurisdiction to grant ancillary monetary judgments – Road Transport Act 1987, ss. 91 & 96 – Specific Relief Act 1950, s. 41 – Rules of Court 2012, O. 15 r. 16*

COMPANY LAW: *Winding-up – Insurance company – Service of notice under s. 218(a) of Companies Act 1965 against insurance company – Whether insurance company is an 'institution' – Whether s. 195 of Financial Services Act 2013 applicable – Whether Bank Negara Malaysia's written approval must be obtained before winding-up petition could be presented against an institution – Whether presentation of s. 218(a) notice constituted an offence – Financial Services Act 2013, ss. 10(4), 195(1) & 254(1)*

INSURANCE: *Motor insurance – Insurer's liability – Statutory liability – Notice under s. 96(2)(a) of Road Transport Act 1987 – Mistake as to particulars of registration number of vehicle – Whether detrimental to claimant – Whether mistake negated insurer's statutory liability*

WORDS & PHRASES: *'not entitled to any legal character, or to any right as to any property' – Specific Relief Act 1950, s. 41*

WORDS & PHRASES: *'authorised person' – Financial Services Act 2013, s. 195(1)*

On 8 December 1984, the first defendant was driving a car with the second and third defendants when the first to third defendants ('the defendants') met with an accident caused by a lorry driven by one Mr Ang Ching Leong ('Ang'). At the time of the accident Encik Ahmad bin Long ('Ahmad') was the registered owner of the car. Following the accident, the defendants and

Ahmad filed a civil suit on 8 June 1989 against Ang and Lam Soon Oil & Soap Sdn Bhd ('Lam Soon SB') in the Seremban Sessions Court ('Seremban case'). For the purpose of s. 96 Road Transport Act 1987 ('RTA'), the Seremban case was a liability suit. The defendants in their statement of claim ('SOC') in the Seremban case pleaded erroneously that the lorry driven by Ang had the registration number of BBG 1083 and cited Lam Soon SB as a co-defendant. In fact, the registration number of the lorry driven by Ang at the time of the accident was BBG 1038, and not BBG 1083 and was owned by Mota Singh Transportation Group Sdn Bhd ('Mota Singh SB'). The lorry number BBG 1038 owned by Mota Singh SB was insured by the plaintiff company, Pacific & Orient Insurance Co Sdn Bhd while the insurer of the vehicle with the registration number of BBG 1083 was New Zealand Insurance Co Ltd ('NZ Insurance Co'). During the trial in the Seremban case, the defendants, applied orally to the Sessions Court Judge ('SCJ') to amend the registration number of the lorry in the SOC from BBG 1083 to BBG 1038. There was no objection by Lam Soon SB and hence, the oral application was allowed ('amendment order'). However, the decision was overturned by the Seremban High Court ('the first Seremban HC judgment'). The appeal by the defendants against the first Seremban HC judgment was dismissed by the Court of Appeal. Hence, the Seremban case was proceeded with, wherein the Sessions Court dismissed the suit with costs. The appeal by the defendants to the Seremban High Court was allowed ('the second Seremban HC judgment'). Ang and Lam Soon SB did not contest the appeal to the second Seremban HC judgment merely because the Seremban case only concerned lorry no BBG 1083 and not lorry no BBG 1038 driven by Ang at the time of the accident. On 27 March 2008, the defendants wrote to the plaintiff demanding the judgment sum but was denied by the plaintiff stating that they were not the relevant insurers of the motor vehicle at the time of the accident, *ie*, lorry no. BBG 1083. Subsequently, on 10 July 2008, the defendants filed a recovery suit against the plaintiff in the Kuala Lumpur Session Court ('KL SC suit'). The reliefs applied for by the defendants in the KL SC suit, among others, were judgment sum and costs totalling RM204,275 in respect of the second Seremban HC judgment. However, the KL SC suit was dismissed with costs ('KL SC judgment'). The subsequent notice of appeal filed by the defendants was struck off due to their failure to file the record of appeal.

On 30 September 2013, the defendants filed a KL High Court suit ('KLHC suit') against the plaintiff in Kuala Lumpur New Commercial Court No 4 ('NCC4 Court') seeking the following reliefs, *inter alia*, (i) a declaration that the plaintiff was on 8 December 1984 the authorised insurer of a motorlorry driven by Ang pursuant to s. 91(1)(a) of the RTA; (ii) a declaration that on 8 December 1984, Ang was a person insured under a motor insurance policy issued by the plaintiff pursuant to s. 91(1)(b) of the RTA; (iii) a declaration

that the plaintiff had sufficient notice of the institution of the Seremban case as required under s. 96(2)(a) of the RTA; and (iv) the ancillary orders that the plaintiff shall pay the defendants the judgment sum obtained in the Seremban SC judgment and the second Seremban HC judgment and the plaintiff to pay costs of the KLHC suit. The plaintiff did not attend the hearing of KLHC suit citing the reason that when the cause papers of KLHC suit were served on the plaintiff, the plaintiff needed time to retrieve the file for the present case because it was an 'old' matter. By the time the plaintiff managed to find the file for the case, the defendants had obtained a judgment from NCC4 Court on 29 November 2013 ('KLHC judgment') allowing the reliefs sought by the defendants. On 19 March 2015, the defendants sent a letter enclosing a statutory notice under s. 218(2)(a) of the Companies Act 1965 ('CA') ('s. 218(a) notice') to the plaintiff referring to the KLHC's judgment and demanded the plaintiff's payment of a sum totalling RM251,515 ('the demanded sum') within three weeks from the date of receipt of the s. 218(2)(a) notice and in the event the plaintiff failed and/or neglected to pay the demanded sum, the plaintiff shall be deemed to be unable to pay its debts within the meaning of s. 218 of the CA. The plaintiff in its reply to the letter stated, among others, that (i) the KLHC judgment was made without jurisdiction in light of the KL SC judgment; (ii) a declaratory order is not enforceable by way of execution; and (iii) s. 195(1) of the Financial Services Act 2013 ('FSA') prohibits the presentation of a winding-up petition against an insurance company. The plaintiff subsequently filed the instant originating summons against the defendants. The issues that arose for the court's determination herein were: (a) whether one High Court has the jurisdiction to set aside another High Court's perfected judgment; (b) whether the High Court may grant declarations under s. 41 of the Specific Relief Act 1950 ('SRA') and O. 15 r. 16 of the Rules of Court 2012 ('ROC') regarding an insurer's liability (insurer's statutory liability) under s. 91 read with s. 96 of the RTA to satisfy a judgment obtained in a suit (liability suit) when: (i) the liability suit concerned a motor vehicle which had not been insured by the insurer; (ii) the insurer had no notice of the liability suit before or within seven days after the commencement of the liability suit (as required by s. 96(2)(a) of the RTA); and/or (iii) the insurer has successfully defended a 'recovery suit' and was not legally bound to pay the judgment sum obtained in the liability suit; (c) if the High Court could not grant declaratory orders regarding an insurer's statutory liability, can the High Court still nevertheless grant ancillary orders compelling the insurer to pay the judgment sum obtained in the liability suit; and (d) whether a s. 218(2)(a) notice based on a judgment, can be served on an insurance company in light of s. 195 of the FSA.

A B C D E F G H I

Held (allowing declarations prayed by plaintiff):

(1) The High Court has inherent jurisdiction to set aside an earlier sealed order or judgment of a High Court in rare and exceptional circumstances ('vitiating circumstances'). The High Court's jurisdiction to set aside an earlier perfected order or judgment, based on lack of jurisdiction and/or fraud, is statutory and is based on s. 44 of the Evidence Act 1950 ('EA') *ie*, on the ground that the court in question 'is not competent to deliver' the order or judgment. The plaintiff had relied on one set of rare and exceptional vitiating circumstances to set aside the KLHC judgment, namely NCC4 Court had no jurisdiction to grant the perfected KLHC judgment ('jurisdictional challenge'). (paras 43-45)

(2) The procedure to be adopted by an applicant depends on the justice of the case. The High Court was asked to exercise its inherent jurisdiction and/or statutory jurisdiction under s. 44 of the EA and no particular mode of procedure, for a case such as this, has been prescribed under the adjectival law. As the plaintiff had filed the OS to set aside KLHC judgment based on the jurisdictional challenge, it was only just for the plaintiff to file the OS without applying to NCC4 Court to set aside KLHC judgment; or the Court of Appeal for an extension of time to appeal to the Court of Appeal against KLHC judgment. (paras 47 & 49)

(3) One High Court may set aside another High Court's 'final judgment' if the judgment is proved to be 'null and void on ground of illegality or lack of jurisdiction' (*Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd* ('*Badiaddin*')). It was further decided in *Badiaddin* that a party may challenge a sealed order or judgment on the grounds of lack of jurisdiction and illegality without applying to the same court which has pronounced the order or judgment in question; or appealing against the order or judgment sought to be impugned. The *ratio decidendi* of *Badiaddin* supported the procedure adopted by the plaintiff *ie*, the filing of a fresh action in the form of the OS to set aside KLHC judgment for lack of jurisdiction. (paras 51 & 54)

(4) An insurer's statutory liability arises when an insurer is legally bound under s. 96(1) of the RTA to pay a person who has died or who has suffered bodily injury in a motor accident subject to the conditions, *inter alia*, that (i) the insurer has issued an insurance policy to a policy holder; (ii) a certificate of insurance in the prescribed form and which contains prescribed particulars has been delivered by the insurer to the policy holder; (iii) the insured is a 'person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to

any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road'; (iv) the insured has caused death or bodily injury to the victim by or arising out of the use of a motor vehicle; (v) the victim has filed a liability suit against the insured in respect of liability covered by an insurance policy under s. 91(1)(b) of the RTA; (vi) before or within seven days after the commencement of the liability suit, the insurer has notice of the liability suit; (vii) the victim has obtained a judgment against the insured in the liability suit; and (viii) the non-existence of any of the circumstances stated in s. 96(2)(b), (c) and (3) of the RTA. (para 64)

(5) It is clear that the fifth condition requires a liability suit to be filed regarding an insurer's liability in respect of, among others, the correct motor vehicle which has been insured by the insurer. If a liability suit is filed regarding a motor vehicle which has not been insured by the insurer, the insurer's statutory liability under ss. 91 and 96 of the RTA, cannot arise. The SOC in the Seremban case had pleaded that the lorry driven by Ang at the time of the accident, had the registration number BBG 1083. The first Seremban HC judgment had refused leave for the defendants to amend the SOC in Seremban case in respect of the registration number of the lorry driven by Ang at the time of the accident. The first Seremban HC judgment had been affirmed by the Court of Appeal's decision. This meant the first Seremban HC judgment was final and *res judicata*. (paras 65 & 66)

(6) Based on the principle of issue estoppel, which is the second limb of *res judicata* doctrine: (i) the defendants were bound by the Court of Appeal's decision and the first Seremban High Court judgment regarding the fact that the Seremban case only concerned lorry with the registration number BBG 1083; and (ii) the defendants were barred from contending that the Seremban case concerned lorry with the registration number BBG 1038. Hence, the Seremban case was not a liability suit which concerned the plaintiff because the plaintiff did not insure the lorry with the registration number BBG 1083. In the circumstances, NCC4 Court did not have the jurisdiction under s. 41 of the SRA to grant the declaratory orders. (paras 67 & 68)

(7) The notice envisaged by s. 96(2)(a) of the RTA should contain correct particulars regarding, among others, the registration number of the vehicle in question in order to assist the insurer to make an informed decision in respect of the liability suit. The insurer's statutory liability arises under s. 96 of the RTA even if no recovery suit has been filed against the insurer. The defendants relied on the then solicitor for the first defendant, Messrs Khoo & Sidhu's ('Messrs KS'), letter dated 5 March 1986 to contend that the plaintiff had notice of the Seremban

case. However, the letter referred to the lorry with the registration number BBG 1083 which was not insured by the plaintiff. Therefore, the contention could not be acceded to. Further, the plaintiff's letter dated 6 November 1985 to Messrs KS also could not be considered since the contents of the letter was not only marked 'without prejudice' but also had expressly stated that the plaintiff's request in the letter 'is made without prejudice or admission of liability'. Consequently, the insurer's statutory liability could not arise and NCC4 Court did not possess the jurisdiction under s. 41 of the SRA to make the declaratory orders. (paras 70-72)

(8) By way of the KL SC judgment, the defendants' recovery suit had been dismissed and the defendants' failure to proceed with an appeal to the High Court against the KL SC judgment meant that the KL SC judgment was final and *res judicata*. Therefore, the plaintiff could not be liable to the defendants for the Seremban SC judgment and/or the second Seremban HC judgment. Accordingly, the NCC4 Court did not have the jurisdiction under s. 41 of the SRA to make the declaratory orders. Further, the defendants were bound by the KL SC judgment and were barred by cause of action estoppel principle, the second limb of *res judicata* doctrine, from filing the KLHC suit to re-visit KL SC judgment. In view of the final KL SC judgment, the KLHC suit constituted an abuse of court process by the defendants. (para 75)

(9) When a party is not 'entitled to any legal character, or to any right as to any property' under s. 41 of the SRA, O. 15 r. 16 of the ROC cannot confer jurisdiction on a High Court to grant a declaration. Since the insurer's statutory liability could not arise in this case, especially in view of the dismissal of the recovery suit, the defendants were not 'entitled to any legal character, or to any right as to any property' within the meaning of s. 41 of the SRA. (para 79)

(10) A declaratory order cannot be enforced (*Takako Sakao v. Ng Pek Yuen & Anor*; refd, *Maziah Musa v. Dato Zainulabidin Mat Akhir & Ors*; refd). As the NCC4 Court had no jurisdiction to grant declaratory orders, it had no jurisdiction to grant ancillary monetary judgments to compel the plaintiff to pay the defendants. (para 83)

(11) The plaintiff is an 'institution' to which s. 195 of the FSA applies. According to s. 195(1) of the FSA, no winding-up petition can be presented against an 'institution' such as the plaintiff, without Bank Negara Malaysia's ('BNM') prior written approval. Any breach of s. 195(1) of the FSA constitutes an offence. The plaintiff was licensed to carry on 'insurance business' under s. 10(4) of the FSA. Hence, the plaintiff was an 'authorised person' for the purpose of the FSA. The purpose of s. 195 of the FSA is to maintain public confidence in

'institutions', including insurance companies. If any person can present a winding-up petition against an insurance company without BNM's prior written approval, this may generally erode public confidence in insurance companies and specifically cause irreparable harm to the insurance company in question. (paras 90-92, 96 & 108)

(12) The defendants had not applied for, let alone obtained, BNM's prior written approval to present a winding-up petition against the plaintiff. Yet, s. 218(2)(a) notice had been sent to the plaintiff. As s. 112 of the Insurance Act 1996 has been repealed by s. 271 of the FSA, it could not be the lawful basis for the service of the s. 218(2)(a) notice to the plaintiff. Therefore, the notice constituted an attempt under s. 254(1)(a) of the FSA to commit an offence under s. 195(1) of the FSA; and/or an act preparatory to, or in furtherance of, the commission of an offence under s. 195(1) of the FSA within the meaning of s. 254(1)(b) FSA. Further, the demanded sum claimed by the defendants was *bona fide* disputed on substantial grounds by the plaintiff. In the circumstances, the plaintiff was entitled to a '*Fortuna* injunction'. (paras 98, 101 & 102)

(13) If the plaintiff had secured or compounded the demanded sum to the 'reasonable satisfaction' of the defendants as provided in s. 218(2)(a) of the CA, the defendants could not present a winding-up petition against the plaintiff based on the demanded sum. The plaintiff had paid the sum stated in KLHC judgment together with interest and costs into the client account of the plaintiff's solicitors. Once money has been paid into a client account of a solicitor, the Solicitors' Account Rules 1990 ('SAR') shall apply. The money can only be withdrawn from a solicitor's client account as provided in rr. 7 and 8 of the SAR. The plaintiff's payment into solicitor's client account constituted a security or a compounding of the demanded sum to the 'reasonable satisfaction' of the defendants within the meaning of s. 218(2)(a) of the CA. (paras 104 & 105)

(14) The demanded sum totalled only RM251,515. The plaintiff was an insurance company which was licensed under FSA to carry on 'insurance business' under s. 10(4) FSA. The plaintiff would have presumably complied with all the capital adequacy and liquidity requirements of BNM and it was thus inconceivable for the plaintiff to be commercially insolvent. Even if a winding-up petition was presented against the plaintiff, the petition was bound to fail because the petitioner, as an on-going insurance company, was commercially solvent. The balance of convenience lies heavily in favour of the grant of a '*Fortuna* injunction' in this case. (paras 109 & 113)

(15) The plaintiff's absence in the NCC4 Court had 'directly contributed' to the making of the KLHC judgment. In the circumstances, the plaintiff was not awarded costs pursuant to the court's discretion under O. 59 r. 3(2) of the ROC. (para 117)

Case(s) referred to:

Adon Mohd Pendik & Anor v. Danaharta Urus Sdn Bhd (High Court Originating Summons No: 24NCC-147-04-2015) (Unreported) ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(foll)***

Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors [2011] 5 CLJ 481 FC ***(refd)***

Dato Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

EON Bank Bhd v. Sri Tanjong Travel Sdn Bhd & Ors [2014] 1 LNS 995 HC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(dist)***

Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd [2011] 5 CLJ 866 CA ***(refd)***

Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***

Maziah Musa v. Dato' Zainulabidin Mat Akhir & Ors [2014] 1 LNS 1034 HC ***(refd)***

Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen [2015] 4 CLJ 54 CA ***(refd)***

Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***

Pacific & Orient Insurance Co Bhd v. Zakaria Salleh [2011] 1 LNS 299 HC ***(refd)***

Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor [2014] 1 CLJ 18 FC ***(refd)***

Ramli Samad v. Pacific & Orient Insurance Co Sdn Bhd [2010] 1 CLJ 970 CA ***(refd)***

RHB Bank Bhd v. Gunasingam Ramasingam [2002] 5 CLJ 544 HC ***(refd)***

Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16 CA ***(refd)***

Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd [1997] 1 CLJ 596 CA ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor (No 3) [2010] 1 CLJ 429 FC ***(refd)***

Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***

Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(dist)***

Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd [2010] 2 CLJ 541 CA ***(refd)***

Legislation referred to:

Central Bank of Malaysia Act 2009, s. 2(1)

Civil Law Act 1956, s. 11

Companies Act 1965, ss. 217, 218(2)(a), 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240

Evidence Act 1950, s. 44

Financial Services Act 2013, ss. 2(1), 10(4), 11, 191, 195(1), (3), 254(1)(a), (b), 268, 271

Insurance Act 1996, s. 112(2)

Interpretation Acts 1948 and 1967, ss. 2(1)(b), (e), 3, 23(1)

Road Transport Act 1987, ss. 91(1)(a), (b), (4), 96(2)(a), (b), (c), (3)
Rules of Court 2012, O. 1A, O. 2 r. 1(2), O. 12 r. 12, O. 15 r. 16, O. 28 r. 3A, O. 42 rr. 12, 13, O. 59 rr. 3(2), 8(b)
Rules of the High Court 1980, O. 42 r. 12
Solicitors' Account Rules 1990, rr. 7, 8
Specific Relief Act 1950, ss. 41, 50, 51(1), (2)

For the plaintiff - RK Nathan; M/s Vinod Kamalanathan
For the defendants - Americk Sidhu; M/s Americk Sidhu

Reported by S Barathi

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] This is a sad case where victims of a road accident have not been compensated for their injuries for more than 30 years. This misfortunate incident is compounded by a litany of abuses of court process which has led to a statutory notice under s. 218(2)(a) of the Companies Act 1965 (CA) to wind up an insurance company (s. 218(2)(a) notice).

Issues

[2] The following questions, among others, arise in this case:

(a) Whether one High Court has the jurisdiction to set aside another High Court's perfected judgment?;

(b) Whether the High Court may grant declarations under s. 41 of the Specific Relief Act 1950 (SRA) and O. 15 r. 16 of the Rules of Court 2012 (RC) regarding an insurer's liability (insurer's statutory liability) under s. 91 read with s. 96 of the Road Transport Act 1987 (RTA) to satisfy a judgment obtained in a suit (liability suit) when:

(i) the liability suit concerns a motor vehicle which has not been insured by the insurer;

(ii) the insurer has no notice of the liability suit before or within seven days after the commencement of the liability suit (as required by s. 96(2)(a) RTA); and/or

(iii) the insurer has successfully defended a 'recovery suit' (recovery suit) and is not legally bound to pay the judgment sum obtained in the liability suit;

(c) If the High Court cannot grant declaratory orders regarding an insurer's statutory liability, can the High Court still nevertheless grant ancillary orders compelling the insurer to pay the judgment sum obtained in the liability suit?; and

(d) Whether a s. 218(2)(a) notice based on a judgment, can be served on an insurance company in light of s. 195 of the Financial Services Act 2013 (FSA).

Background

[3] On 8 December 1984, the first defendant (first defendant) was driving a car with the second and third defendants (second and third defendants) as passengers when the first to third defendants met with an accident (accident) caused by a lorry driven by Mr Ang Ching Leong (Mr Ang). The accident happened when the first defendant was driving the car along the road from Seremban to Tampin.

[4] Encik Ahmad bin Long (Encik Ahmad) was the registered owner of the car at the time of the accident.

Proceedings In Seremban Courts

[5] On 8 June 1989, the first to third defendants and Encik Ahmad filed Civil Suit No. 53-40-1989 against Mr Ang and Lam Soon Oil & Soap Sdn Bhd (Lam Soon SB) in the Seremban Sessions Court (Seremban case). For the purpose of the Seremban case:

(a) I will refer to the first to third defendants and Encik Ahmad collectively as the "plaintiffs in Seremban case"; and

(b) Mr Ang and Lam Soon SB will be referred to collectively as the "defendants in Seremban case".

[6] The problem started with the plaintiffs in Seremban case pleading erroneously in their statement of claim (SOC in Seremban case) that the lorry driven by Mr Ang had the registration number of BBG 1083 and citing Lam Soon SB as a co-defendant.

[7] It is not disputed that the lorry number BBG 1038 (not BBG 1083) was driven by Mr Ang at the time of the accident and was owned by Mota Singh Transportation Group Sdn Bhd (Mota Singh SB). The lorry number BBG 1038 owned by Mota Singh SB is insured by the plaintiff company in this case, Pacific & Orient Insurance Co Sdn Bhd (plaintiff) while the insurer of the vehicle with the registration number of BBG 1083 is New Zealand Insurance Co Ltd (NZ Insurance Co).

[8] The defence of the defendants in Seremban case had denied that Lam Soon SB's vehicle was involved in the accident. Sadly, the plaintiffs in the Seremban case did not apply to court to amend the SOC in Seremban case. Lam Soon SB applied to strike out the Seremban case but this application was successfully opposed by the plaintiffs. The plaintiffs in Seremban case then proceeded with the trial in the Seremban case.

[9] During the trial in the Seremban case: A

(a) Mr Ang testified that he drove lorry number BBG 1038 (not BBG 1083) at the time of the accident and the registered owner of that lorry was Mota Singh SB; and

(b) an insurance claim form had been submitted to the plaintiff in respect of the accident (insurance claim form) and the insurance claim form stated that lorry number BBG 1038 (not BBG 1083) was involved in the accident. B

[10] In view of the above evidence adduced by the defendants in Seremban case, learned counsel for plaintiffs in Seremban case, applied orally to the learned Sessions Court Judge to amend the registration number of the lorry in the SOC in Seremban case from BBG 1083 to BBG 1038 (oral application). There was no objection by Lam Soon SB's learned counsel to the oral application. This is understandable because if the oral application is allowed, this is in the interest of both Lam Soon SB and NZ Insurance Co. In any event, Lam Soon SB was wrongly cited as a co-defendant in the Seremban case. C D

[11] The learned Sessions Court Judge allowed the oral application (amendment order).

[12] On 24 January 2006, Azhar Maah J (as he then was) in the Seremban High Court allowed the appeal against the amendment order and gave a written judgment (first Seremban High Court's judgment). I produced the relevant part of the first Seremban High Court's judgment as follows: E

> *Berikutan dari itu pula defendan telah memfailkan pembelaannya di mana di antara lain mereka menafikan penglibatan kenderaan berkenaan di dalam kemalangan yang dinyatakan di dalam penyata tuntutan plaintif. Selanjutnya hasil dari maklumat yang diperolehi oleh defendan dari Motor Insurance Bureau, peguam defendan telah melalui surat peguamnya bertarikh 12 April 1994 memberitahu peguam plaintif bahawa defendan pertama tidak pada bila-bila pernah bekerja dengan pemilik kenderaan BBG 1083 dan kenderaan yang sebenarnya terlibat dalam kemalangan berkenaan ialah sebuah trailer bernombor BBG 1038. Walaupun telah menerima maklumat ini masih tiada tindakan dari plaintif untuk membuat sebarang pembetulan atau pindaan ke atas pernyataan tuntutannya dan selanjutnya mengemukakan tuntutannya kepada pemilik kenderaan sebenar.* Dengan keadaan sedemikian defendan telah terpaksa memfailkan permohonan untuk membatalkan tuntutan plaintif terhadap defendan kedua. Permohonan ini telah ditentang oleh plaintif, mengakibatkan ianya ditolak dengan kos. F G H
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> *Keputusan Mahkamah* I

Meneliti hujahan-hujahan dan rekod rayuan Mahkamah memberi perhatian kepada perkara-perkara berikut:

(i) peguam plaintif telah diberitahu melalui surat peguam defendan bertarikh 12 April 1994 bahawa nombor sebenar lori yang terlibat di dalam kemalangan berkenaan ialah BBG 1038 dan defendan pertama Ang Chin Leong tidak pernah bekerja dengan pemilik lori BBG 1083;

(ii) peguam plaintif juga telah mendapat maklumat melalui surat yang disalurkan kepadanya oleh Motor Insurance Bureau bertarikh 20.9.93 bahawa mengikut siasatan adjusters Ang Chin Leong telah memandu lori treler bernombor BBG 1038 dan bukannya BBG 1083.

Peguam plaintif juga diberitahu berkemungkinan pihak polis telah melakukan kesilapan di dalam mencatitkan nombor lori berkenaan sebagai BBG 1083.

(iii) Peguam plaintif telah melalui surat JPJ Ipoh bertarikh 16.6.87 mendapat tahu bahawa kenderaan BBG 1083 adalah sebuah lori kecil (Ford) dan melalui surat JPJ Ipoh bertarikh 2.9.89 bahawa kenderaan yang bernombor BBG 1083 adalah sebuah van (Ford);

(iv) permohonan defendan untuk membatalkan tuntutan plaintif terhadap defendan kedua mengeksibitkan "motor vehicle claim form" yang dengan nyatanya menunjukkan bahawa defendan pertama pada tarikh dan masa berkenaan berlakunya kemalangan memandu lori "Hino Truck" bernombor BBG 1038.

...

Meneliti rentetan perkara dan hal-hal yang berlaku berikutan pemfailan prosiding ini, dapat dilihat bahawa masalah berhubung dengan nombor lori berkenaan timbul disebabkan ketidakperhatinan dan kedegilan peguam plaintif sendiri. Berasaskan perkara-perkara (i), (ii), (iii) dan (iv) di atas, peguam plaintif sewajar dan seharusnya mengambil langkah dan inisiatif untuk menentukan apakah nombor sebenar lori yang terlibat dalam kemalangan. Permohonan defendan dan dokumen-dokumen yang dibawa keperhatian peguam plaintif sudah pasti dapat memberi petunjuk kepada peguam tersebut bahawa ada sesuatu yang tidak kena. Justeru itu sebagai peguam yang berhemah dia seharusnya bertindak sewajarnya untuk memperbetulkan keadaan dan kedudukan kesnya dari awal lagi.

Di dalam kes ini peguam plaintif hanya memohon untuk meminda penyata tuntutannya di saat-saat yang terlalu lewat, iaitu ketika defendan hampir menutup kesnya. Keadaan sebegini sudah tentunya memudarat dan memprejudiskan defendan pertama dan juga pihak insuran yang akhirnya akan menanggung dan menerima risiko dari perintah yang dibuat.

...

Berdasarkan perkara-perkara yang disebutkan di atas dan berlandaskan autoriti yang dikemukakan saya berpendapat bahawa pindaan yang dipohon oleh plaintif tidak seharusnya dibenarkan. Justeru itu rayuan defendan dibenarkan dengan kos.

(emphasis added).

[13] According to para. 35 of an affidavit affirmed by the first defendant (in this case) on 25 September 2003 (first defendant's affidavit (KLHC suit)) in support of Kuala Lumpur High Court Originating Summons No. 24NCC-324-09-2013 (KLHC suit), the plaintiffs in Seremban case had appealed to the Court of Appeal against the first Seremban High Court's judgment but this appeal was dismissed (Court of Appeal's decision (first Seremban High Court's judgment)).

[14] The plaintiffs in Seremban case proceeded to the conclusion of the Seremban case. On 24 July 2006, the Seremban Sessions Court dismissed the suit with costs (Seremban Sessions Court's judgment). I produce the Seremban Sessions Court's judgment as follows:

> PENGHAKIMAN
>
> TINDAKAN INI setelah dipanggil untuk keputusan pada hari ini dalam kehadiran Encik Ahmad Sofian menyebut bagi pihak peguamcara Plaintif dan Defendan.
>
> DAN SETELAH MENDENGAR keterangan saksi-saksi DAN SETELAH MEMBACA pliding-pliding dan dokumen-dokumen yang difailkan dan penghujahan peguam Plaintif.
>
> *MAKA ADALAH PADA HARI INI DIHAKIMI bahawa Defendan Pertama adalah 100% cuai atas kemalangan ini.*
>
> *DAN SETERUSNYA DIHAKIMI bahawa gantirugi dalam kes ini ditaksirkan seperti yang berikut:*
>
> *Gantirugi Am*
>
> | | |
> |---|---|
> | *(a) Plaintif Pertama (Normala Bte Omar)* | *RM15,000.00* |
> | *(b) Plaintif Kedua (Abdul Rahman Bin Ahmad* | *RM38,000.00* |
> | *(c) Plaintif Ketiga (Mazlan Bin Ahmad)* | *RM26,000.00* |
>
> *DAN SETERUSNYA DIHAKIMI bahawa gantirugi am tersebut diawadkan dengan faedah pada kadar 8% setahun dari tarikh penyerahan Saman dan Pernyataan Tuntutan (19/6/1979) sehingga tarikh penyelesaian.*
>
> *DAN PADA AKHIRNYA DIHAKIMI bahawa tuntutan Plaintif-plaintif ditolak dengan kos.*
>
> (emphasis added).

[15] The Seremban Sessions Court's judgment seemingly allowed the claim by the plaintiffs in Seremban case but the last part of the Seremban Sessions Court's judgment dismissed the suit by the plaintiffs in Seremban case.

[16] The plaintiffs in Seremban case appealed to the Seremban High Court against the Seremban Sessions Court's judgment and not surprisingly, Abdul Alim Abdullah J allowed the appeal on 11 January 2008 (second Seremban

A High Court's judgment). There is no written judgment given by Abdul Alim Abdullah J and the second Seremban High Court's judgment is produced as follows:

PENGHAKIMAN

B *RAYUAN INI dipanggil untuk pendengaran pada hari ini dengan kehadiran Encik Americk Sidhu, Peguamcara bagi pihak Perayu dan tanpa kehadiran Responden walaupun diserahkan dengan Rekod Rayuan, Rekod Rayuan Tambahan dan dimaklumkan tarikh perbicaraan hari ini.*

...

C *ADALAH DIHAKIMI bahawa Rayuan ini dibenarkan.*

DAN SELANJUTNYA DIHAKIMI bahawa Responden dikehendaki membayar kepada Perayu-perayu, gantirugi dan faedah yang ditaksirkan di Mahkamah Sesyen melalui Penghakiman bertarikh 24.07.2006.

D *DAN AKHIRNYA DIHAKIMI bahawa kos Rayuan di Mahkamah Tinggi dan juga segala kos Mahkamah Sesyen dikehendaki dibayar oleh Responden sebanyak RM6,775.00 mengikut taksiran skala kos Mahkamah Rendah.*

(emphasis added).

[17] It is noted that learned counsel for Mr Ang and Lam Soon SB did not contest the appeal to Abdul Alim Abdullah J for an obvious reason, E namely, the Seremban case only concerned Lorry No. BBG 1083 and not Lorry No. BBG 1038 driven by Mr Ang at the time of the accident.

[18] On 27 March 2008, the then solicitors for the defendants (in this case), Messrs Isharidah, Ho, Chong & Menon (Messrs IHCM), wrote a letter F to the plaintiff (in this case) and stated, among others (Messrs IHCM's letter dated 27 March 2008):

We refer to the above matter [Seremban Case and 2nd Seremban High Court's Judgment] in which you are the insurers of motorlorry No. BBG 1083/BBG 1038 driven at all material times by your insured driver [Mr. Ang], on the above date.

G We enclose herewith copies of the following documents: [Seremban Sessions Court Judgment and 2nd Seremban High Court's Judgment].

As insurers of motorlorry No. BBG 1083/BBG 1038, you are obliged to pay the judgment sum, interest and costs pursuant to Section 96(1) [RTA], the figures for which are as follows: ...

H (emphasis added).

[19] The plaintiff (in this case) replied to Messrs IHCM's letter dated 27 March 2008 by way of a letter dated 23 April 2008 (plaintiff's letter dated 23 April 2008). The plaintiff's letter dated 23 April 2008 stated, among others (with grammatical errors):

I *... Kindly take note that your notice given vide [Messrs IHCM's Letter dated 27.3.2008] is not specific as to which motorvehicle number yourselves are proceeding against in this matter. The suit is however and your remedy was sought against BBG*

1083. In light of same, we shall not be effecting payment of the judgment sum as we are only the insurers of motorvehicle BBG 1083 on 8/12/1984 as per the pleadings in your clients' statement of claim vide [Seremban Case].

As such, TAKE NOTICE that we shall not be liable to meet the claim as intimated by yourselves and we shall not indemnify your clients as we are not the relevant insurers of motorvehicle No. BBG 1083 at the material time of the accident on 8/12/1984. Please take note that should yourselves and/or your clients wish to pursue to make any further claims in respect of the judgment of the High Court (including the S218 Notice suggested by you), we shall file such proceedings as we deem necessary/appropriate in court so as to recover from yourselves all sums of legal costs, interests, damages and/or incidental expenses incurred by us. …

(emphasis added).

[20] Messrs IHCM responded to the plaintiff's letter dated 23 April 2008 by way of a letter dated 24 April 2008 (Messrs IHCM's letter dated 24 April 2008). Messrs IHCM's letter dated 24 April 2008 stated, among others (with typographical error regarding the year of RTA):

… If there is any confusion as regards the correct number of the motor lorry insured by your goodselves, this rests solely with you.

We would be obliged you could elect as to which motor lorry you were the insurers of on 08.12.1984, BBG 1038 or BBG 1083?

In any event, your insured driver [Mr. Ang] was driving your insured motor lorry at the time of the accident and has admitted this in Court.

Are you denying [Mr. Ang] is a person insured under your policy? Please could you provide us with an answer to this query.

As the matter stands, there is an outstanding judgment against him which you were obliged to satisfy by virtue of S.96 of the RTA 1957 [sic]

You have, vide your letter to our clients previous solicitors, Messrs Khoo & Sidhu, confirmed cover on motor lorry No: BBG 1083 at the time of the accident (8/12/84).

A copy of this letter dated 06.11.1985 is enclosed for your reference.

You may consider resolving this matter immediately to avoid further unnecessary costs, the amount of which, to date is rather substantial.

If however you choose to adhere to the stand that you are not the insurers of motor lorry No: BBG 1083 at the time of the accident, then you will have to concede that you were the insurers of motor lorry No: BBG 1038 instead.

If you decide on the latter, we shall nevertheless proceed to execute recovery of the judgment sum against yourselves citing both numbers as alternatives.

We therefore suggest very strongly that you do the right thing in the circumstances and revert to us immediately.

Please take very serious note of the above.

(emphasis added).

Proceedings in Kuala Lumpur Sessions Court (KL Sessions Court)

[21] For the purpose of s. 96 RTA, the Seremban case is a liability suit.

[22] On 10 July 2008, the first to third defendants (in this case), filed Civil Suit No. 52-22259-2008 in the KL Sessions Court against the plaintiff (in this case) (KL Sessions Court suit). The KL Sessions Court suit is the recovery suit filed by first to third defendants (in this case) against the plaintiff (in this case). For the purpose of the KL Sessions Court case, I will refer the first to third defendants (in this case) collectively as "plaintiffs in KL Sessions Court suit" while the plaintiff (in this case) will be described as "defendant in KL Sessions Court suit".

[23] In the KL Sessions Court suit, the plaintiffs in KL Sessions Court suit have applied for the following relief, among others:

(a) Judgment sum and costs totalling RM204,275 in respect of the second Seremban High Court's judgment;

(b) Interest of 5% per annum on the sum of RM204,275 from 19 April 2008 until date of settlement; and

(c) Costs of KL Sessions Court suit and costs of the appeal in respect of the second Seremban High Court's judgment.

[24] On 25 June 2010, after hearing submissions from all parties, the KL Sessions Court suit was dismissed with costs (KL Sessions Court's judgment).

[25] The plaintiffs in KL Sessions Court suit filed a notice of appeal dated 6 July 2010 to the High Court against the KL Sessions Court's judgment but this appeal was struck off due to the failure of the solicitors for the plaintiffs in KL Sessions Court Suit to file the record of appeal. I will deal with the effect of such a failure later in this judgment.

KLHC Suit

[26] On 30 September 2013, the first to third defendants (in this case) filed KLHC suit against the plaintiff (in this case) in Kuala Lumpur New Commercial Court No. 4 (NCC 4 court). For the purpose of KLHC suit, I will refer the first to third defendants (in this case) collectively as "plaintiffs (KLHC suit)" while the plaintiff (in this case) will be described as "defendant (KLHC suit)".

[27] In KLHC Suit, the plaintiffs (KLHC suit) applied for the following relief from NCC 4 court:

1. A Declaration that [Defendant (KLHC Suit)] was on 08.12.1984, the authorised insurer of a motorlorry driven by [Mr. Ang] pursuant to [s 91(1)(a) RTA];

2. A further Declaration that [Mr. Ang] was on 08.12.1984, a person insured under a motor insurance policy issued by [Defendant (KLHC Suit)] pursuant to [s 91(1)(b) RTA];

3. A further Declaration that [Defendant (KLHC Suit)] had sufficient notice of the institution of [Seremban Case] as required under [s 96(2)(a) RTA];

4. After this Honourable Court has decided on the above Declarations, ancillary orders as follows:

    1. An Order that [Defendant (KLHC Suit)] shall pay [Plaintiffs (KLHC Suit)] the judgment sum obtained in [Seremban Sessions Court's Judgment] and [2nd Seremban High Court's Judgment] including all interest and costs ordered therein pursuant to [s 96(1) RTA];

    2. An Order that [Defendant (KLHC Suit)] to pay costs of [KLHC Suit];

    3. An Order for any other relief as this Honourable Court thinks just and fit.

[28] Surprisingly, the defendant (KLHC suit) did not attend the hearing of KLHC suit. The excuse given in sub-para. 19(a) of the second affidavit of the plaintiff's deponent filed in this case (court enclosure no. 9), was that when the cause papers of KLHC suit were served on the plaintiff, the plaintiff needed time to retrieve the file for this case because this was an "old" matter. By the time the plaintiff managed to find the file for this case, the plaintiffs (KLHC suit) had obtained a judgment from NCC 4 court on 29 November 2013 (KLHC's judgment).

[29] The KLHC's judgment stated as follows:

1. [Defendant (KLHC Suit)] was on 08.12.1984, the authorised insurer of a motorlorry driven by [Mr. Ang], namely the First Defendant in [Seremban Case] pursuant to [s 91(1)(a) RTA] [**Paragraph 1**];

2. [Mr. Ang] was on 08.12.1984, a person insured under a motor insurance policy issued by [Defendant (KLHC Suit)] pursuant to [s 91(1)(b) RTA] [**Paragraph 2**];

3. [Defendant (KLHC Suit)] had sufficient notice of the institution of [Seremban Case] as required under [s 96(2)(a) RTA] [**Paragraph 3**];

IT IS FURTHER ADJUDGED that [Defendant (KLHC Suit)] shall pay the Plaintiffs (KLHC Suit) the judgment sum obtained in [Seremban Sessions Court's Judgment] and [2nd Seremban High Court's Judgment] including all interest and costs ordered therein pursuant to [s 96(1) RTA] [**Paragraph 4**].

A **IT IS ALSO ADJUDGED** that [Defendant (KLHC Suit)] shall pay costs of [KLHC Suit] of RM3,000 [**Paragraph 5**].

IT IS FINALLY ORDERED that the entire judgment sum including accrued interest and costs shall be paid by [Defendant (KLHC Suit)] to client's account of the solicitors for the Plaintiffs (KLHC Suit), namely
B Messrs Americk Sidhu [**Paragraph 6**].

(emphasis added).

Section 218(2)(a) Notice To Plaintiff

[30] On 19 March 2015, the solicitors for the defendants, Messrs
C Americk Sidhu (Messrs AS), sent a letter enclosing a s. 218(2)(a) notice to the plaintiff (Messrs AS's letter dated 19 March 2015). Messrs AS's letter dated 19 March 2015 stated, among others, as follows:

...

D 2. Please find attached, [Section 218(2)(a) Notice] dated 19.3.2015 by way of service on you.

3. *Please arrange for immediate payment to be made as per the terms of the [KLHC's Judgment] to avoid the necessity of our having to present a winding up petition against your Company.*

E (emphasis added).

[31] The s. 218(2)(a) notice referred to the KLHC's judgment and demanded the plaintiff's payment of a sum totalling RM251,515 (demanded sum) within three weeks from the date of receipt of the s. 218(2)(a) notice and in the event the plaintiff failed and/or neglected to pay the demanded
F sum, the plaintiff shall be deemed to be unable to pay its debts within the meaning of s. 218 CA.

[32] The plaintiff's solicitors, Messrs Vinod Kamalanathan & Associates (Messrs VKA), replied to Messrs AS's letter dated 19 March 2015 by way of a letter dated 25 March 2015 (Messrs VKA's letter dated 25 March 2015).
G Messrs VKA's letter dated 25 March 2015 stated, among others:

(a) The KLHC's judgment was made without jurisdiction in light of KL Sessions Court's judgment;

(b) A declaratory order is not enforceable by way of execution; and

H (c) Section 195(1) FSA prohibits the presentation of a winding up petition against an insurance company. Any breach of s. 195(1) FSA is punishable under s. 195(3) FSA with a maximum imprisonment term of five years and/or a maximum fine of RM10 million.

[33] Messrs AS replied to Messrs VKA's letter dated 25 March 2015 by
I way of a letter dated 27 March 2015 (Messrs AS's letter dated 27 March 2015). Messrs AS's letter dated 27 March 2015 stated, among others:

...

2. In response thereto, we wish to state the following:

(i) *[KLHC Suit] sought different relief than that sought in [KL Sessions Court Suit];*

(ii) *the declaratory relief sought in [KLHC Suit] was accompanied by prayers for ancillary Orders and a monetary judgment if the declarations so sought were allowed;*

...

(viii) *when [KLHC Suit] came up for hearing on the 29.11.2013, your clients were not represented once again. The Judge therefore proceeded to hear the matter and delivered [KLHC's Judgment];*

...

5. *Section 195(1) [FSA] is at variance with the provisions of s 112(2) of the Insurance Act 1996 (IA).*

6. *In any event, we have yet to present a winding-up petition to the High Court against your clients. If the necessity arises, we may make the S. 195(1) application to Bank Negara. We trust this will not be necessary.*

7. *In any event, the threat of a fine and imprisonment may be a little premature at this stage.*

8. *In the circumstances, we wish to advise you that we are disinclined to withdraw the [Section 218(2)(a) Notice] until and unless your clients make payment of the sum demanded. ...*

(emphasis added).

This Suit

[34] On 3 April 2015, the plaintiff filed Originating Summons No. 24NCC-137-04-2015 against the defendants (OS). The OS prayed for the following relief:

(a) An injunction to restrain the defendants, their solicitors, employees and agents from filing a winding up petition against the plaintiff based on the s. 218(2)(a) notice issued by way of Messrs AS's letter dated 19 March 2015, until the disposal of the notice of application filed by the plaintiff (NA) and OS (Prayer (a));

(b) If the defendants have filed a winding up petition against the plaintiff, an injunction to restrain the defendants, their solicitors, employees and agents from serving, advertising, gazetting or publishing the petition to third party until the disposal of the NA and OS (Prayer (b));

(c) A declaration that the defendants have no legal right to issue the s. 218(2)(a) notice which arises from the KLHC's judgment (Prayer (c));

(d) A declaration that the KLHC's judgment is not valid and should be set aside (Prayer (d));

(e) A declaration that the s. 218(2)(a) is bad in law in view of the KL Sessions Court's judgment (Prayer (e));

(f) A declaration that the s. 218(2)(a) notice is invalid because the defendants have failed to comply with s. 195(1) FSA (Prayer (f));

(g) A declaration that NCC 4 court has no jurisdiction to grant the KLHC's judgment (Prayer (g));

(h) A declaration that the judgment sum stated in the KLHC's judgment is disputed and the defendants should not have issued the s. 218(2)(a) notice (Prayer (h));

(i) A declaration that the s. 218(2)(a) notice constitutes an abuse of court process as the entire judgment sum including interest and costs as provided in the KLHC's judgment had already been paid into the client account of the plaintiff's solicitors pending the disposal of the NA and OS (Prayer (i));

(j) A declaration that the plaintiff is entitled to defend the plaintiffs' claim *vide* the s. 218(2)(a) notice pending the disposal of the NA and OS as the plaintiff has demonstrated its ability to pay debts by depositing the demanded sum into the client account of the plaintiff's solicitors and this sum would be held by the plaintiff's solicitors as stakeholders (Prayer (j)); and

(k) costs.

[35] The plaintiff filed an *ex parte* NA dated 3 April 2015 on a certificate of urgency as the three week period stipulated in the s. 218(2)(a) demand would expire on 9 April 2015. The NA applied for, among others:

(a) An injunction to restrain the defendants, their solicitors, employees and agents from filing a winding up petition against the plaintiff based on the s. 218(2)(a) notice issued by way of Messrs AS's letter dated 19 March 2015, until the disposal of the NA and OS;

(b) If the defendants have filed a winding up petition against the plaintiff, an injunction to restrain the defendants, their solicitors, employees and agents from serving, advertising, gazetting or publishing the petition to third party until the disposal of the NA and OS; and

(c) Costs.

[36] In view of the urgency of the matter, I directed the learned Deputy Registrar to fix the hearing of the *ex parte* NA before me on 6 April 2015. On 6 April 2015, after hearing submission from the plaintiff's learned

counsel, Dato' Kamalanathan Ratnam, I granted an *ex parte* injunction as prayed for in prayers (a) and (b) of NA (*ex parte* injunction) (with the plaintiff's undertaking to pay damages if the NA and OS are subsequently dismissed). I also fixed the *inter partes* hearing of the NA on the same date as the OS (17 April 2015).

[37] On 17 April 2015:

(a) the defendants were represented by learned counsel, Mr Americk Singh Sidhu;

(b) I ordered a joint hearing of the NA and OS (joint hearing) due to the following two reasons:

(i) if there is no joint hearing and the NA is heard first, any decision made in NA shall bind all parties in the OS by virtue of the following trilogy of Court of Appeal cases, all decided by Gopal Sri Ram JCA (as he then was):

(1) in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57, p. 114 (CLJ); p. 66 (MLJ), Gopal Sri Ram JCA held as follows:

> We cannot over emphasise the proposition that once a judge makes a ruling, substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened willy-nilly.;
>
> (emphasis added); and

(2) *Hartecon JV Sdn Bhd* has been followed in *Syarikat Telekom Malaysia v. Business Chinese Directory Sdn Bhd* [1997] 1 CLJ 596, at 599-600 and *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553, at 563-566 (*Prorak Sdn Bhd*); and

(ii) the joint hearing will ensure an expeditious and economical disposal of both the NA and OS; and

(c) the defendants' learned counsel properly conceded to an *ad interim* injunction as per prayers (a) and (b) of NA pending the disposal of the NA and OS (*ad interim* injunction). Such a concession by the defendants' learned counsel is correctly made in the light of the Federal Court's judgment given by Raus Sharif PCA in *Petrodar Operating Co Ltd v. Nam Fatt Corporation Bhd & Anor* [2014] 1 CLJ 18, at 42-43. The plaintiff gave an undertaking to pay damages in respect of the *ad interim* injunction.

A **Plaintiff's Contentions**

[38] In support of the NA and OS, the plaintiff advances, among others, the following arguments:

(a) Based on the Court of Appeal's judgment in *Ramli Samad v. Pacific & Orient Insurance Co Sdn Bhd* [2010] 1 CLJ 970; [2010] 3 MLJ 23, the plaintiff is only liable to the defendants if there is a judgment obtained by the defendants against Mota Singh SB, the person insured by the plaintiff;

(b) The defendants have not given statutory notice to the plaintiff in respect of lorry No. BBG 1038 as required by s. 96(2)(a) RTA. As such, the KLHC's judgment has been granted in breach of s. 96(2)(a) RTA. The plaintiff relies on the Federal Court's judgment given in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 and the Court of Appeal case of *Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen* [2015] 4 CLJ 54;

(c) The defendants did not appeal to the Court of Appeal against the first Seremban High Court's judgment. Nor did the defendants appeal to the High Court against the KL Sessions Court's judgment. Accordingly, the defendants are barred by *res judicata* doctrine from proceeding with the KLHC suit against the plaintiff. The plaintiff relies on the Supreme Court's judgment in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189;

(d) The plaintiff has paid the demanded sum into the client account of the plaintiff's solicitors. The plaintiff's solicitors therefore hold the demanded sum as stakeholders pending the disposal of the NA and OS. There is no provision in RC for the plaintiff to pay the demanded sum into court pending the disposal of the NA and OS;

(e) Section 195(1) FSA requires the defendants to obtain the consent of Bank Negara Malaysia (BNM) before the defendants can file a winding up petition against an insurance company such as the plaintiff;

(f) The defendants have failed to highlight to NCC 4 court the KL Sessions Court's judgment (the defendants' failure in the recovery suit against the plaintiff); and

(g) The defendants should not have obtained para. 4 in the KLHC's judgment because the defendants had not obtained a judgment against the plaintiff's insured, Mota Singh SB.

Defendants' Submission

[39] The defendants initially filed a written submission (defendants' first written submission) before the *inter partes* hearing of the NA on 17 April 2015. According to the defendants' first written submission, the defendants

opposed, among others, an interlocutory injunction to restrain the defendants from proceeding to file a winding up petition against the plaintiff. Before the joint hearing, the defendants' second written submission (defendants' second written submission) "accept that the plaintiff is solvent due to the fact that the plaintiff's solicitors have confirmed they hold the judgment sum, interest and costs in their clients account and that their counsel has, in open court on 17 April 2015, undertaken to maintain these monies in that account, and to inform the defendants' (*sic*) solicitors of this from time to time". As such, according to the defendants' second written submission, the defendants "are therefore not minded to pursue winding up proceedings against the plaintiff" and the *ex parte* injunction "may stand, with liberty" (I think the defendants' learned counsel has in mind the *inter partes* injunction sought by the plaintiff in the NA and OS).

[40] Except for the injunctive relief sought by the plaintiff in the OS, the defendants opposed all the other prayers in the OS on, among others, the following grounds:

(a) Order 12 r. 12 RC does not require the defendant (KLHC suit) to enter an appearance in KLHC suit. Accordingly, the plaintiffs (KLHC suit) cannot enter a judgment in default of appearance against the defendant (KLHC suit) in NCC 4 court. Order 28 r. 3A RC mandatorily requires the originating summons filed in KLHC suit to be heard in chambers of NCC 4 court;

(b) KLHC's judgment has been given after:

(i) the cause papers for the KLHC suit (cause papers) have been duly served on the plaintiff. An affidavit of service of the cause papers on the plaintiff (affidavit of service), has been filed in KLHC suit;

(ii) all available evidence has been placed before NCC 4 court; and

(iii) the defendants' learned counsel has presented written and oral submission to NCC 4 court.

In view of the above facts, the KLHC's judgment is regular, valid and enforceable. In any event, the plaintiff has not shown that the KLHC's judgment has been obtained in breach of RC;

(c) the KLHC's judgment has been sealed. Accordingly, this court is *functus officio* and cannot set aside the KLHC's judgment;

(d) based on the judgments of Mohd Azmi and Peh Swee Chin FCJJ in the Federal Court case of *Badiaddin* as well as the Federal Court's decision in *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143, the plaintiff cannot apply to another High Court (as in this case) to

set aside a regular and final KLHC's judgment made by a concurrent court such as NCC 4 court. Reliance has also been placed by the defendants on the following Court of Appeal's judgments:

(i) *Prorak Sdn Bhd*; and

(ii) *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16;

(e) the plaintiff in this case is mandatorily obliged under O. 42 r. 13 RC to apply to NCC 4 court to set aside KLHC's judgment;

(f) the plaintiff could have applied to the Court of Appeal for an extension of time to appeal to the Court of Appeal against the KLHC's judgment but the plaintiff had failed to do so;

(g) the sealed KLHC's judgment has been served on the plaintiff on 6 December 2013. The OS is however only filed on 3 April 2015. There has been a delay of almost 16 months by the plaintiff in filing the OS. Such a delay has not been explained by the plaintiff; and

(h) the OS lacks merits for the following reasons:

(i) the insurance claim form had been filled up by Mr Ang. In the insurance claim form, Mr Ang had admitted driving lorry No. BBG 1038 at the time of the accident;

(ii) in the Seremban case, Mr Ang had given the following oral evidence:

(1) Mr Ang drove lorry No. BBG 1038 at the time of the accident;

(2) Mr Ang's employer was Mota Singh SB which had been insured by the plaintiff;

(3) Mr Ang had signed the insurance claim form before an officer of the plaintiff; and

(4) adjusters from the plaintiff had interviewed Mr Ang;

(iii) the Seremban Sessions Court's judgment had found Mr Ang 100% liable for the accident;

(iv) requisite notice of the Seremban case under s. 96(2)(a) RTA had been given to the plaintiff by way of a letter dated 5 March 1986 from the then first defendant's solicitors, Messrs Khoo & Sidhu (Messrs KS's letter dated 5 March 1986); and

(v) there is no distinction between a person who purchases a motor insurance policy (policy holder) and a person who is insured under the policy (insured). An insured can also be a policy holder. Mr Ang

is the insured in this case whereby the defendants have obtained Seremban Sessions Court's judgment and second Seremban High Court's judgment. Accordingly, the defendants need not obtain judgment against the policy holder in this case, Mota Singh SB; and

(i) NCC 4 court has the jurisdiction to make KLHC's judgment under the wide provisions of s. 41 SRA and O. 15 r. 16 RC.

Can A Perfected High Court Order Or Judgment Be Challenged?

[41] The first issue to be resolved is whether the plaintiff can set aside the perfected KLHC's judgment.

[42] In *Adon Mohd Pendik & Anor v. Danaharta Urus Sdn Bhd*, Kuala Lumpur High Court Originating Summons No. 24NCC-147-04-2015, at paras. 62-66, I have decided on 13 August 2015 as follows based on my understanding of Malaysian case law:

K. Grounds to invalidate perfected court order or judgment

62. My understanding of Malaysian case law is that when there is no appeal to the Court of Appeal against a sealed order or judgment of the High Court, such a perfected order or judgment can only be subsequently set aside by the High Court in the exercise of its inherent jurisdiction [either by the same court (which has granted the earlier order or judgment) or by another court] in rare and exceptional circumstances (Vitiating Circumstances).

K1. Court order or judgment is made without jurisdiction

63. In my view, the first set of Vitiating Circumstances is when the court in question does not have jurisdiction, competence or power to make the order or judgment. The following cases are relevant:

(a) in the Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75, at 92-93, Azmi FCJ decided as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court "... which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise

A of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make."

(emphasis added).

B The above judgment by Azmi FCJ was concurred by Eusoff Chin CJ and Wan Adnan Ismail FCJ (as he then was) in *Badiaddin*, at p. 97;

(b) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 2 MLJ 37, Abdoolcader J (as he then was) delivered the Federal Court's judgment to set aside C an order of the then Collector of Land Revenue (CLR) which had purportedly cancelled an earlier order for sale of charged land made by the CLR's predecessor. According to the Federal Court in *Eu Finance Bhd*, at p. 39-40:

There is no power in the Collector to cancel an order made D under section 263 [NLC] or the sale to be effected thereby.

…

The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it E can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon - in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Lord Diplock L.J. (now a Law Lord) said (at F page 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.

Where a decision is null by reason of want of jurisdiction, it G cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' [*Birmingham (Churchwardens and Overseers) v. Shaw* (1849) 10 QB 868 880; 116 H ER 329 at page 880 (per Denman C.J.)]. In *Barnard v. National Dock Labour Board* [1953] 2 QB 18, 34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at page 34 per Singleton L.J.). *Ridge v. Baldwin* [1964] AC 40 is to the I same effect.

> Lord Denning said in *Director of Public Prosecutions v. Head* [1959] AC 83 (at page 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in *Regina v Paddington Valuation Officer & Anor, Ex parte Peachey Property Corporation Ltd (No 2)* [1966] 1 QB 380 (at page 402). The judgment of this court in *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155, 157 refers (at page 157) to the decision of the House of Lords in *London & Clydeside Estates Ltd v. Aberdeen District Council & Anor* [1980] 1 WLR 182, 189 and a passage in the judgment of the Lord Chancellor, Lord Hailsham of St. Marylebone (at page 189) where he refers to a spectrum of possibilities as the legal consequence of non-compliance with statutory requirements and speaks of one extreme where there has been such an outrageous and flagrant violation of a fundamental obligation that what has been done may be safely ignored and treated as having no legal consequence and in the event of any reliance sought thereon the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own.
>
> The decision of this court in *Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234 to the effect that section 418 which provides for an appeal is the exclusive remedy of an aggrieved person or body against a decision *inter alia* of a Collector of Land Revenue and precludes any claim for declaratory relief, on which the respondent seeks to rely, has no application to the present proceedings as the decision sought to be impugned in that case was made within jurisdiction and was not a nullity. We reiterate the second order in the matter before us is invalid and wholly dehors the provisions of the Code and no appeal is therefore essential or necessary to impugn its validity and it can be subject to collateral attack in the instant proceedings.
>
> (emphasis added).

The Federal Court's judgment in *Eu Finance Bhd* has been affirmed on appeal by the Privy Council in *Lim Yoke Foo v. Eu Finance Bhd* [1985] 1 MLJ 17. According to Lord Brightman who delivered the Privy Council's opinion in *Lim Yoke Foo*, at p. 19-20:

> The Federal Court decided that there was no power under the National Land Code for a Collector to cancel an order for sale made under section 263(1).Therefore the 1976 order remained on foot and the 1979 order was "no order at all within and for the purposes of section 263 and is a nullity and devoid of any effect". The only powers of the Collector, once the 1976 order had been made, were to postpone the date of sale if expedient under section 264(3), or to correct verbal errors or remedy accidental defects or omissions, if not matters of substance, pursuant to section 33.

A Their Lordships respectfully agree with the decision and reasoning of the Federal Court.

(emphasis added).

It is to be noted that the material facts in *Eu Finance Bhd* concerned an order made by the CLR (now Land Administrator under the NLC) and
B does not involve a court order or judgment;

(c) in *Teng Foh t/a Teng Foh Construction v. Liwu Realty Sdn Bhd* [1989] 2 MLJ 425, at 426:

(i) the petitioner had obtained a default judgment against the respondent company in a civil suit;
C

(ii) based on the default judgment, the petitioner filed a winding up petition against the respondent company;

(iii) before the hearing of the respondent company's application to set aside the default judgment in the civil suit, the petitioner
D withdrew the suit against the respondent company. The petitioner's learned counsel however still applied to the High Court to wind up the respondent company (in the absence of the learned counsel for the respondent company) and the respondent company was thereby ordered to be wound up; and

(iv) the respondent company applied successfully to LC Vohrah J in
E the winding up court to set aside its earlier winding up order as the petitioner had already withdrawn his suit against the respondent company. The High Court therefore had no jurisdiction under s. 218(1)(a) to (n) CA to wind up the respondent company when the petitioner's suit against the
F respondent company had been withdrawn and the petitioner could no longer rely on the default judgment as a basis for the winding up petition against the respondent company; and

(d) in *Panaron Sdn Bhd v. Univac Switchgear Sdn Bhd* [2014] 6 AMR 432, [2014] 2 AMCR 806, [2015] 2 CLJ 286, [2015] 9 MLJ 498, sitting as a winding up judge, I set aside an earlier winding up order of the
G respondent company made by the Kuala Lumpur winding up court because:

(i) prior to the winding up of the respondent company by the Kuala Lumpur High Court, the respondent company had already been wound up by the Shah Alam High Court (Shah Alam Winding
H Up Order); and

(ii) I set aside an earlier sealed winding up order of the respondent company by the Kuala Lumpur High Court on the ground that the Kuala Lumpur High Court lacked jurisdiction under s. 218(1)(a) to (n) CA to wind up the respondent company (due
I to the Shah Alam Winding Up Order).

64. In respect of the High Court's lack of jurisdiction, competence or power to make a particular order or judgment, s. 44 of the Evidence Act 1950 (EA) is relevant. Section 44 EA provides as follows:

> *Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.*
>
> (emphasis added).

A party may challenge the validity of a perfected order or judgment under s. 44 EA on the ground that the court in question is "not competent to deliver" the order or judgment.

65. I have decided earlier in *EON Bank Bhd v Sri Tanjong Travel Sdn Bhd & 3 Ors* [2014] 5 AMR 693, at 701, that whether a court has the jurisdiction, competence or power to make an order or judgment under a statutory provision, is a question of construction of the statutory provision.

66. When a court does not have jurisdiction, competence or power to make an order or judgment:

(a) parties cannot consent, elect, waive or acquiesce to the jurisdiction of the court. This is clear from the following cases:

  (i) the Federal Court's judgment in *Fung Beng Tiat v. Marid Construction Co* [1996] 2 MLJ 413, at 421, delivered by Gopal Sri Ram JCA (as he then was); and

  (ii) *EON Bank Bhd*, at p. 701;

(b) the doctrine of *functus officio* does not bar the setting aside of a perfected court order or judgment which has been made without jurisdiction. In the Federal Court case of *Badiaddin*, at p. 117, Gopal Sri Ram JCA's (as he then was) decided as follows:

> *It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance. Neither has the functus officio theory, which, upon close examination is merely part and parcel of the doctrine of res judicata, any role to play in the case.*
>
> (emphasis added);

(c) the doctrines of estoppel and *res judicata* do not bar an application to set aside a sealed order or judgment made by a court without jurisdiction - Gopal Sri Ram JCA's (as he then was) judgment in the Federal Court case of *Badiaddin*, at p. 117; and

A (d) delay, procedural non-compliance and/or inequitable conduct by an applicant (to set aside a perfected order or judgment on the ground of lack of court's jurisdiction) does not bar the applicant - *EON Bank Bhd*, at p. 701.

[43] I am of the view that according to the cases discussed in *Adon*, in B particular *Badiaddin* and *Selvam Holdings (Malaysia) Sdn Bhd*, the High Court has inherent jurisdiction to set aside an earlier sealed order or judgment of a High Court in rare and exceptional circumstances (vitiating circumstances). I am of the further view that the High Court's jurisdiction to set aside an earlier perfected order or judgment based on lack of jurisdiction and/or C fraud, is statutory and is based on s. 44 of the Evidence Act 1950 (EA).

[44] In this case, the plaintiff has relied on one set of rare and exceptional vitiating circumstances to set aside the KLHC's judgment, namely NCC 4 court has no jurisdiction to grant the perfected KLHC's judgment (jurisdictional challenge).

D **[45]** Under s. 44 EA, a party may challenge a sealed order or judgment on the ground that the court in question "is not competent to deliver" the order or judgment. The jurisdictional challenge can only be resolved by interpreting the relevant statutory provision to ascertain whether the court has the necessary jurisdiction to make the order or judgment in question - E *EON Bank Berhad v. Sri Tanjong Travel Sdn Bhd & Ors* [2014] 1 LNS 995; [2014] 5 AMR 693, at 701.

[46] If the construction of the relevant statutory provision reveals that the court does not possess the necessary jurisdiction to make a perfected order or judgment, the following matters raised by the defendants cannot bar this F court from setting aside the order or judgment:

(a) the fact that the KLHC's judgment is regular and has been obtained *inter partes* (there is an affidavit of service filed in KLHC suit) in compliance with RC, does not confer jurisdiction on NCC 4 court to make the KLHC's judgment - Mohd Azmi FCJ's judgment in *Badiaddin* (at p. 92); G

(b) the fact that the KLHC's judgment has been sealed (which triggers the application of the *functus officio* doctrine) does not prevent this court from setting aside KLHC's judgment if it can be shown that KLHC's judgment has been made without any jurisdiction - judgments of Mohd H Azmi FCJ (at p. 97) and Gopal Sri Ram JCA (as he then was) (at p. 113) in *Badiaddin*;

(c) Order 42 r. 13 RC states as follows:

> Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order I or judgment, a party intending to set aside or to vary such order

> or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.

I am of the view that O. 42 r. 13 RC does not bar an application to one High Court to set aside a sealed order or judgment made by another High Court without jurisdiction. I decide as such for the following reasons:

(i) Part I of the Interpretation Acts 1948 and 1967 [IA (1948 & 1967)] applies to EA by virtue of s. 2(1)(b) IA (1948 & 1967) [because EA has been revised under the Revision of Laws Act 1968 (RLA)]. Part I of IA (1948 & 1967) also applies to RC according to s. 2(1)(e) IA (1948 & 1967) as RC constitute "subsidiary legislation" (as defined in s. 3 IA (1948 & 1967)) made after the 31 December 1968, under Courts of Judicature Act 1964 (which has also been revised under RLA).

Section 23(1) of Part 1 of IA (1948 & 1967) provides as follows:

> Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency.
>
> (emphasis added).

If, as contended by the defendants, O. 42 r. 13 RC bars an application to set aside a sealed order or judgment made without jurisdiction, O. 42 r. 13 RC will be inconsistent with s. 44 EA. In such a case, by virtue of s. 23(1) IA (1948 & 1967), O. 42 r. 13 RC "shall be void to the extent of the inconsistency" with s. 44 EA. In other words, O. 42 r. 13 RC cannot bar an application under s. 44 EA to one High Court to set aside a perfected order or judgment made by another High Court without jurisdiction.

In *Lim Eng Kay v. Jaafar Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190; [1982] 2 MLJ 156, at 201 & 202 (CLJ); 162 (MLJ), Salleh Abas FJ (as he then was) decided in the Federal Court on the effect of O. 42 r. 12 of the then Rules of the High Court 1980 (RHC) *vis-à-vis* s. 11 of the Civil Law Act 1956 (CLA):

> Counsel for the respondent in submitting that interest on this lump sum should be at 8% with effect from the date of trial to the date of realisation relied upon Order 42 rule 12 [RHC]. This order says:
>
> > 12. Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

Although the Order is expressed in imperative "shall", it is certainly not intended to be so; because to give effect would be incompatible with the discretionary power of the court to order interest under section 11 [CLA]. We do not think that Order 42 rule 12 can override the provision of the Act.

(emphasis added);

(ii) the purpose of O. 42 r. 13 RC is to ensure that a party intending to set aside or vary a sealed order and judgment, should do so promptly and in any event, within 30 days after the party has received the sealed order or judgment. The purposive interpretation of O. 42 r. 13 RC does not mean that this provision is intended to bar applications to set aside perfected orders or judgments which have been given without jurisdiction. The words "any order or judgment" in O. 42 r. 13 RC must, in my opinion, mean orders and judgments which have made by courts which possess the necessary jurisdiction or competence; and

(iii) according to O. 1A RC, in administering RC, including O. 42 r. 13 RC, the court "shall have regard to the overriding interest of justice and not only to the technical non-compliance" with RC. Order 2 r. 1(2) RC provides that RC are a procedural code which is subject to the overriding objective of enabling the court to deal with cases justly. The above interpretation of O. 42 r. 13 is in consonance with O. 1A and O. 2 r. 1(2) RC to ensure that justice is attained by one High Court setting aside a perfected order or judgment of another High Court made without jurisdiction; and

(d) the plaintiff's delay in applying to set aside the perfected KLHC's judgment, cannot confer jurisdiction on NCC 4 court to make KLHC's judgment - *EON Bank Bhd*, at p. 701.

How To Set Aside Sealed High Court Order Or Judgment?

[47] If the High Court has the inherent jurisdiction to set aside an earlier High Court order or judgment based on vitiating circumstances (if the vitiating circumstances are one of jurisdiction or fraud, s. 44 EA confers statutory jurisdiction), the next question that arises is what is the procedure to be adopted by an applicant who intends to set aside an earlier perfected High Court order or judgment (applicant)? This question concerns the following matters:

(a) should the applicant apply to the same High Court (which has granted the sealed order or judgment) to set aside the order or judgment?;

(b) should the applicant appeal to the Court of Appeal against the perfected High Court order or judgment?;

(c) can the applicant file a fresh action in one High Court to set aside a sealed order or judgment of another High Court?; and

(d) can a defendant in a suit raise a defence that a perfected High Court order or judgment is invalid based on the vitiating circumstances?

[48] In *Adon*, at paras. 74-76, I took the following view based on the Siti Norma Yaakob JCA's (as she then was) judgment in the Court of Appeal case of *Selvam Holdings (Malaysia) Sdn Bhd*:

> 74. In respect of the Defendant's submission that the Plaintiffs should have appealed to the Court of Appeal against the Winding Up Order, I rely on the Court of Appeal's judgment in *Selvam Holdings,* at p. 24 and 26-27, as follows:
>
> *Under the aforesaid circumstances, a court is seised with the necessary jurisdiction to entertain an application to set aside the earlier order ex debito justitiae. Expressed in another way there is no need to adopt the appeal procedure nor to file a fresh suit to set aside the defective order. That can be done in the same proceedings where the impeached order was granted and before the same judge or another judge with concurrent jurisdiction.*
>
> …
>
> *In this regard, the conduct of the appellant is most relevant and most telling. The originating summons was filed whilst the originating motion before Abdul Aziz Mohamad J was part heard pending decision. Both summonses seek remedies that have the same effect. The originating summons was heard two weeks after it was filed, thereby stealing a march on the originating motion.*
>
> *We say that the appellant's behaviour is highly questionable and that of their solicitors most unprofessional. Under these circumstances we consider that filing a fresh action to set aside the 1993 order is an exercise in futility as it is counter productive and it will be adding another suit to an already long list of actions relating to the same subject matter. One need only read the judgment of the trial judge to appreciate the numerous suits and summonses filed by the appellant following their non-acceptance of the winding up order as they contend that they were not the entity affected by the order. But they had not appealed against that order. Instead they filed the originating motion which has since been decided by Abdul Aziz Mohamad, J. Again no appeal had been lodged by the appellant in that originating motion. This later judgment runs contrary to the 1993 order and whilst we appreciate that a court is not bound by a decision of another court exercising concurrent jurisdiction, nonetheless the appellant are now placed in the most anomalous position in that there are two existing and conflicting orders as to their legal status. Since the appellant had not appealed against both orders, the interveners have provided the alternative whereby the appellant's legal status can be finally resolved.*

A *Under these circumstances we consider that the justice of the case entitles the interveners to apply to set aside the 1993 order ex debito justitiae in the same proceedings in which the 1993 order was made and further that the High Court was not functus officio to hear and determine such application under its inherent jurisdiction and we so hold.*

B (emphasis added).

75. Based on *Selvam Holdings,* a party may adopt the following procedure to set aside a perfected order or judgment of a High Court:

(a) appeal to the Court of Appeal against the High Court order or judgment. When the one month time period for appeal to the Court
C of Appeal has lapsed, an application to the Court of Appeal for an extension of time to appeal under r. 12 RCA is necessary;

(b) apply to the same court (which has granted the order or judgment) to set aside the order or judgment; or

(c) file a fresh suit in the same court or another court to set aside the
D order or judgment in question

(3 Options).

According to *Selvam Holdings*, which of the 3 Options to be adopted by a party in a particular case, depends on the justice of the case. In *Selvam Holdings*, at p. 26-27, the Court of Appeal decided, among others, that the
E fresh suit filed by the appellant to set aside an earlier winding up order, was "an exercise in futility as it is counter productive and it will be adding another suit to an already long list of actions relating to the same subject matter".

76. There may be a fourth option to challenge the validity of a sealed
F order or judgment. A defendant in a suit may raise a defence that a perfected order or judgment is null and void due to the existence of any one of the Vitiating Circumstances.

[49] Based on Selvam Holdings (Malaysia) Sdn Bhd, the procedure to be adopted by the applicant, depends on the justice of the case. This is
G understandable as the High Court is asked to exercise its inherent jurisdiction and/or statutory jurisdiction under s. 44 EA (if the vitiating circumstances concern lack of jurisdiction and/or fraud). Adjectival law (be it RC, Rules of the Court of Appeal 1994 or Rules of the Federal Court 1995) does not prescribe a particular mode of procedure for a case such as this. As the
H plaintiff has filed the OS in this case to set aside KLHC's judgment based on the jurisdictional challenge, I take the view that it is only just for the plaintiff to file the OS without applying to:

(a) NCC 4 Court to set aside KLHC's judgment; or

I (b) Court of Appeal for an extension of time to appeal to the Court of Appeal against KLHC's judgment.

[50] The defendants have relied on the judgments of Mohd Azmi and Peh Swee Chin FCJJ in Badiaddin to contend that the plaintiff cannot apply to another High Court to set aside the perfected KLHC's judgment. In Badiaddin:

(a) the appellants were the registered co-proprietors of a piece of Malay reserve land;

(b) the appellants registered a third party charge over their land in favour of the respondent finance company (third party charge) to secure a loan from the respondent company to a third party, Encik Ismail bin Omar (third party);

(c) upon the third party's default of the loan from the respondent company, the respondent company obtained an order of sale of the appellant's land from the Land Administrator (sale order);

(d) the appellants applied successfully to Mustapha Hussain J in the High Court on 21 March 1988 to declare the third party charge and sale order invalid for a breach of the Federated Malay States' Malay Reservation Enactment (first order) (at pp. 98-99). There was no appeal by the respondent to the then Supreme Court against the first order (at p. 99);

(e) the respondent company made a second application to Mustapha Hussain J in the same case to declare that the appellants had received an advantage or benefit from the respondent company and accordingly, the appellants should restore such an advantage or benefit to the respondent company. On 8 October 1990, Mustapha Hussain J allowed the respondent company's application for a declaration and furthered ordered the sale of the appellants' land so that the sale proceeds could be utilised to pay the respondent company for the advantage or benefit received by the appellants (second order) (at p. 99);

(f) the appellants appealed to the Supreme Court against the second order but this appeal was struck out because the appellants did not obtain leave to appeal (at p. 100);

(g) the appellants filed a fresh suit before Mohd Noor Abdullah J (as he then was) to set aside the second order for infringing the Malay Reservations Enactment. On 22 September 1995, Mohd Noor Abdullah J (as he then was) set aside the second order (third order) (at pp. 100-101);

(h) the respondent company appealed to the Court of Appeal against the third order. The Court of Appeal allowed the respondent company's appeal and set aside the third order (Court of Appeal's decision) (at p. 101); and

(i) a five-member coram of the Federal Court unanimously allowed the appellants' appeal, set aside the Court of Appeal's decision and restored the third order (at p. 122).

The material facts of *Badiaddin* clearly showed that a fresh suit (also known as a collateral action) had been allowed by the Federal Court to set aside a perfected High Court order on the sole ground that the order had breached the Malay Reservations Enactment.

[51] I am of the view that the *ratio decidendi* of *Badiaddin* is to be extracted from the judgment of Mohd Azmi FCJ because this judgment has been agreed by Eusoff Chin CJ and Wan Adnan Ismail FCJ (as he then was) (at p. 97). I will discuss later the judgments of Peh Swee Chin FCJ and Gopal Sri Ram JCA (as he then was) in *Badiaddin*.

In *Badiaddin*, at pp. 92, 93 and 97, Mohd Azmi FCJ decided as follows:

> *It is of course settled law as laid down by the Federal Court in Hock Hua Bank case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in Hock Hua Bank) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of Isaacs v. Robertson* [1985] AC 97 …
>
> *For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the Superior Courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened "any written law", the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.*
>
> …
>
> To summarise, Mohd. Noor Abdullah, J was correct in law in exercising the inherent jurisdiction of the High Court to set aside *ex debito justitiae* the October 1990 order of Mustapha Hussain, J for the following reasons. The third party charge having been lawfully declared invalid by the High Court in 1988 by virtue of s. 8(i) of the Malay Reservations Enactment, the principal order made in 1990 for restitution of benefits or compensation against the appellants which in effect was an order to enforce an invalid third party security for repayment of loan purportedly decreed under s. 66 of the Contracts Act 1950 was made without or in excess of jurisdiction, and in consequence the order of sale of the appellant's land could not be sustained. Secondly, the sale order itself was in effect an order of execution to satisfy a judgment by the sale of the reservation land by public auction or private treaty (which should be construed in the circumstances as an order of attachment in execution of

the said judgment) and therefore contravened the prohibition imposed by s. 13 of the Malay Reservations Enactment, a legislation especially permitted and protected by art. 89 of the Federal Constitution not only relating to reservation land existing before Merdeka Day, but also in respect of new reservation land.

If counsel in the court below had been more persuasive in the legal concept of ex debito justitiae, I would venture to say that the Court of Appeal would have concluded that Mohd. Noor Abdullah, J had the necessary jurisdiction to exercise his discretion to set aside the order of Mustapha Hussain, J dated 8 October 1990, and that the principle of functus officio, or res judicata could not in any way defeat the inherent jurisdiction of the court to do justice in this particular case.

(emphasis added).

Mohd Azmi FCJ has decided in *Badiaddin*, that one High Court may set aside another High Court's "final judgment" if the judgment is proved to be "null and void on ground of illegality or lack of jurisdiction". Mohd Azmi FCJ further decided that the Federal Court case of *Hock Hua Bank Bhd* did not concern the question of lack of jurisdiction or illegality. Accordingly, the *ratio decidendi* of *Badiaddin* as extracted from Mohd Azmi FCJ's judgment and concurred by Eusoff Chin CJ and Wan Adnan Ismail FCJ (as he then was), supports the procedure adopted by the plaintiff in this case (the filing of a fresh action in the form of the OS to set aside KLHC's judgment for lack of jurisdiction).

[52] In *Badiaddin*, at pp. 97, 103 and 108, Peh Swee Chin FCJ decided as follows:

I have read all the written grounds of judgement since the conclusion of the hearing of the appeal when we allowed the appeal thereat with costs and set aside the order of the court below. It is my misfortune and sorrow as well that I have been unable to agree with such grounds or reasoning and perforce with the greatest respect I have to give my point of view to which I have also committed myself in certain earlier judgements which I have delivered.

…

When a judgement in High Court has been perfected in the manner described in the above passage, a party to the judgment generally and subject to the same passage, or any other written law, and apart from any appeal, cannot re-open the matter finalised in the judgment by seeking to alter it or amend it for the court would be *functus officio* by virtue of the ratio of *Hock Hua Bank v. Sahari bin Murid*. Once perfected, a judgment of the High Court is also entitled to the obedience and respect from the parties to it on the basis of a command from a superior Court of unlimited civil jurisdiction in the course of contentious litigation, see *Issac v. Robertson* [1985] AC 97; *Pembenaan KSY Sdn. Bhd. v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 100. *Puah Bee Hong v. Pentadbir Tanah Daerah Wilayah Persekutuan* [1994] 2 MLJ 601. It is elementary that a superior court is not

A any inferior court or statutory tribunal, (such as a Land Administrator under the National Land Code as in *Eu Finance Bhd. v. Loke Yoke Fou* [1982] 2 MLJ 37). It is also long established that one can apply to set aside an order of a superior court only in direct proceedings filed for the very purpose of having it set aside or valid grounds, but without doing so, one cannot attack its invalidity laterally by raising an objection to its invalidity B in any other proceedings, without filing proceedings for applying to have it set aside first.

When one wishes to file such proceedings to so set it aside, one must do so within the same proceedings or action in which the same order was obtained and not in a separate fresh proceeding or new action on any ground other than those mentioned C *in the quoted passage from Hock Hua Bank v. Sahari bin Murid*, and as mentioned later in this judgment in connection with a consent judgment.

…

I therefore also allowed the appeal with costs and set aside the order of the Court of Appeal below, making a further order that the said order D directly concerned be substituted with another order to the effect that execution of the second order of sale contained in the said previous order be stayed permanently without any right of removal of such stay.

(emphasis added).

E **[53]** I now turn to Gopal Sri Ram JCA's (as he then was) judgment in *Badiaddin*, at pp. 113, 114, 115 and 117, as follows:

It is one thing to say that an order of a court of unlimited jurisdiction must be obeyed until it is set aside. It is quite a different thing to say that a court of unlimited jurisdiction may make orders in breach of written law. Isaacs v. Robertson is certainly not authority for the latter proposition. I take it to be well settled that even courts F *of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the* G *order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.*

…

There are several authorities that deal with the validity of orders made H in excess of jurisdiction by a court of unlimited jurisdiction and I find it sufficient to refer to two of them.

…

I must pause now to mention the decision of the Supreme Court in *Scotch Leasing Sdn. Bhd. v. Chee Pok Choy & Ors* [1997] 2 MLJ 105. …

I …

I am, with respect, unable to agree with this observation [Chee Pok Choy] since it conflicts with well-settled principles enunciated in the two Privy Council cases earlier cited. It is therefore my very respectful view that the decision in Scotch Leasing is wrong.

It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance. Neither has the functus officio theory, which, upon close examination is merely part and parcel of the doctrine of res judicata, any role to play in the case.

(emphasis added).

[54] The judgment of Gopal Sri Ram JCA (as he then was) in *Badiaddin*, supports Mohd Azmi FCJ's ruling that a party may challenge a sealed order or judgment on the grounds of lack of jurisdiction and illegality without:

(a) applying to the same court which has pronounced the order or judgment in question; or

(b) appealing against the order or judgment sought to be impugned.

[55] I am of the following respectful view regarding the judgment of Peh Swee Chin FCJ in *Badiaddin*:

(a) Peh Swee Chin FCJ had expressly acknowledged in Badiaddin that His Lordship's reasons in that case, were not shared by the other members of the Federal Court;

(b) Peh Swee Chin FCJ did not dissent in *Badiaddin* but His Lordship had instead allowed the appeal where the appellants had filed a fresh suit to set aside the second order; and

(c) Peh Swee Chin FCJ's judgment in *Badiaddin*, cannot bar a fresh suit to challenge a perfected High Court's order or judgment in view of the judgments of Mohd Azmi FCJ and Gopal Sri Ram JCA (as he then was).

[56] In *Hock Hua Bank Bhd*:

(a) a third party charge over the respondent's land had been purportedly executed and registered in favour of the appellant bank to secure the repayment of a loan from the appellant bank to a third party;

(b) upon the third party's default of the loan, the appellant bank obtained a High Court order for the sale of the respondent's land in a charge action (I prefer the description of a "charge action" and not "foreclosure proceedings", to reflect the Torrens system embodied in our land law);

(c) the respondent applied in the charge action to the High Court to set aside the order for sale on the ground of, among others, that the respondent did not execute the third party charge (first setting aside application);

(d) the respondent had also filed a fresh suit against the appellant bank and the lawyer who had purportedly attested the respondent's signature on the third party charge. In this action, the respondent alleged fraud and applied for a declaration that the third party charge was invalid;

(e) in the charge action, the High Court dismissed the first setting aside application; and

(f) the respondent filed a second application to the same court to set aside the sale order (second setting aside application). The second setting aside application was allowed by the High Court but this was reversed on appeal by the Federal Court.

Chang Min Tat FJ delivered the following judgment of the Federal Court in *Hock Hua Bank Bhd*, at p. 144:

> *Clearly the court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in Order 28 rule 11 Rules of the Supreme Court 1957 (Order 20 rule 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the court: Re St Nazaire Co 12 Ch D 88, Kelsey v. Doune [1912] 2 KB 482; Hession v. Jones [1914] 2 KB 421, unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: Hip Foong Hong v. Neotia & Co [1918] AC 888 and Jonesco v. Beard* [1930] AC 298. The hearing of the action will in a proper case be expedited: *Smith v. Peizer* 65 SJ 607.
>
> **For these reasons, we allowed the appeal with costs and restored the original order made in the foreclosure proceeding.**
>
> *We have observed that the fresh action necessary to set aside the order on the ground of fraud has been commenced. All that the respondent requires are a stay of the foreclosure proceeding and an expedition of the hearing of the fresh action.*
>
> Fortunately for the respondent, we have been able to overcome the reluctance of counsel for the chargee and to prevail on him to agree to a stay. This would save the solicitors for the chargor having to make the application to the court.
>
> (emphasis added).

[57] I am of the opinion that since *Hock Hua Bank Bhd* does not concern a jurisdictional challenge (as explained by Mohd Azmi FCJ in *Badiaddin*, at p. 92), *Hock Hua Bank Bhd* cannot be an authority to bar a fresh suit from impugning a sealed order or judgment on the ground of a jurisdictional challenge (such as in this case).

[58] The material facts in *Prorak Sdn Bhd* are as follows: A

(a) the respondent company had filed a suit against the appellant company. The appellant company had a counterclaim against the respondent;

(b) when the case was tried in the High Court, the appellant company's learned counsel was absent. Hence, the High Court entered a default B judgment against the appellant company in the respondent company's favour and dismissed the appellant company's counterclaim;

(c) the appellant company filed an application to set aside the default judgment (first application) but on the hearing date of the first application, learned counsel for both the appellant and respondent C companies were absent. As such, the High Court struck out the first application;

(d) the appellant company filed an application to reinstate the first application (reinstatement application). The High Court dismissed the reinstatement application. The appellant company's appeal to the Court D of Appeal against the High Court's dismissal of the reinstatement application, was dismissed;

(e) the appellant company filed a second application to set aside the default judgment (second application). The second application relied on a E different ground from that stated in the first application; and

(f) the High Court dismissed the second application on the ground that the High Court was *functus officio*. This decision was affirmed on appeal to the Court of Appeal.

Gopal Sri Ram JCA (as he then was) held as follows in *Prorak Sdn Bhd*, at F pp. 561 and 562:

> *The inherent jurisdiction in a court to set aside final orders made by it is one that must be exercised with much circumspection. It may be exercised in the case of an order made in contravention of an Act of Parliament. But the jurisdiction does not extend to a final order that is procedurally defective and hence merely irregular. The* G *necessity to carefully maintain the distinction between a final order of a court tainted by procedural irregularity and one made in contravention of statute was stressed by the Federal Court in Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75; [1998] 1 MLJ 393.*
>
> … H
>
> *It is of importance to note that Badiaddin was a case in which the plaintiff had brought a fresh action to rid himself of a final order made in contravention of the Malay Reservation Enactment (FMS Cap 142). It was therefore an exceptional case, as the judgments of the Federal Court in that case make plain. We would observe that on its facts, the present appeal has none of the features that were present in* I *Badiaddin's case. At the risk of repetition, we say that this is not a case where an order had been made in defiance of a substantive statutory provision.*
>
> (emphasis added).

It is clear that *Prorak Sdn Bhd* does not concern a jurisdictional challenge. As such, *Prorak Sdn Bhd*, in my view, does not bar the plaintiff from filing this OS to set aside KLHC's judgment on the ground of lack of jurisdiction.

Does NCC 4 Court Have Jurisdiction To Make KLHC's Judgment?

Insurer's Statutory Liability

[59] Sections 91 and 96 RTA read as follows:

Requirements in respect of policies

91(1) **In order to comply with the requirements of this Part, a policy of insurance must be a policy which:**

(a) **is issued by a person who is an authorised insurer within the meaning of this Part; and**

(b) *insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road:*

Provided that such policy shall not be required to cover:

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(cc) any contractual liability.

(2)(a) Where any payment is made (whether or not with any admission of liability) by:

(i) an authorised insurer under or in consequence of a policy issued under this Act;

(ii) the owner of a motor vehicle in relation to the user of which a security under section 93 is in force; or

(iii) the owner of a motor vehicle who has made a deposit under paragraph 90(5)(d),

in respect of the death of or bodily injury to any person arising out of the use of a motor vehicle on a road, and the person who has so died or been bodily injured has to the knowledge of the authorised insurer or such owner, as the case may be, received treatment at a hospital, whether as an inpatient or as an outpatient, in respect of the injury so arising, there

shall also be paid by the authorised insurer or such owner to such hospital the expenses reasonably incurred by the hospital in affording such treatment, after deducting from such expenses any moneys actually received by the hospital in payment of a specific charge for such treatment:

Provided that the amount to be paid by the authorised insurer or such owner shall not exceed four hundred ringgit for each person so treated as an inpatient or forty ringgit for each person so treated as an outpatient.

(b) For the purposes of this subsection, the expression "hospital" means an institution (not being an institution carried on for profit) which provides medical or surgical treatment for inpatients and the expression "expenses reasonably incurred" means:

(i) in relation to a person who receives treatment at a hospital as an inpatient, an amount for each day such person is maintained in such hospital representing the average daily cost for each inpatient of the maintenance of the hospital and the staff thereof and the maintenance and treatment of the inpatients; provided that in respect of a Government hospital which admits paying patients, "expenses reasonably incurred" means the amount chargeable to a member of the general public, in a ward of the class occupied by the person who received treatment, in accordance with the scale of fees from time to time in force at such hospital; and

(ii) in relation to a person who receives treatment at a hospital as an outpatient, reasonable expenses actually incurred.

(3) *Notwithstanding anything in any written law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or class of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or class of persons.*

(4) *A policy shall be of no effect for the purposes of this Part unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Act referred to as a "certificate of insurance") in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.*

Duty of insurers to satisfy judgments against persons insured in respect of third party risks

96(1) *If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.*

(2) **No sum shall be payable by an insurer under subsection (1)**:

(a) **in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings;**

(b) in respect of any judgment, so long as execution is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either:

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.

(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

(5) In this section, the expression "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risks, and if so at what premium and on what conditions,

and the expression "liability covered by the terms of the policy" means a liability but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(6) In this Part, reference to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

(emphasis added).

[60] An insurer's statutory liability has been explained in three Court of Appeal cases as follows (in chronological order):

(a) *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947 (*Muniammah*);

(b) *Letchumanan Gopal v. Pacific Orient & Co Sdn Bhd* [2011] 5 CLJ 866; [2011] 4 MLJ 541 (*Letchumanan*); and

(c) *Pacific & Orient Insurance Co Bhd v. Kamacheh Karuppen* [2015] 4 CLJ 54 (*Kamacheh*).

[61] Ramly Ali JCA (as he then was) held as follows in *Muniammah*, at pp. 956-958:

[14] *The first issue that needs to be determined is whether the judgment dated 16 December 2009 against the insured (M Sekar a/l Marimuthu) binds and can be enforced against the appellant (as the insurer) under s. 96(1) [RTA].*

[15] **Section 96 relates to the duty of the insurer to satisfy judgment against person insured in respect of third party risks.** …

...

[16] *The statutory provisions of s. 96(1) is very clear. It imposes upon the insurer (the appellant, in this appeal) the obligation of paying to the person who had obtained a judgment against the insured, after a certificate of insurance had been duly delivered to the person by whom the policy* is affected in respect of any third party risk covered under the policy. In short, the appellant in the present appeal is obliged statutorily to pay the respondent who had obtained the judgment dated 16 December 2009 against M Sekar a/l Marimuthu (the insured) for a sum of RM89,374.03. It is also clear under the section that the appellant (insurer) is also obliged to pay the respondent the costs and interest accrued therefrom.

[17] *The insurer would only be able to avoid the payment obligation under the circumstances and conditions mentioned in subs. 2 and 3 of s. 96, that is to say, where the requisite notice of the proceedings was not given to the insurer before the commencement of the proceedings*; where there is a stay of the judgment pending appeal; where the policy of insurance respecting the liability had

A been cancelled; and where the insurer had obtained a declaration from the court that the insurance was void or unenforceable. None of the above-mentioned exceptions apply to allow the appellant (insurer) in the present case to avoid his statutory obligations on the policy.

[18] **That being the case, the judgment debt of the insured (M Sekar a/ l Marimuthu) becomes judgment debt of the appellant (insurer) by virtue of s. 96(1) of the Road Transport Act 1987**.

[19] **Under s. 218(1)(e) of the Companies Act 1965, a company may be wound up if it is unable to pay its debts**. The New Oxford Thesaurus of English defined "debt" as "bill, account, tally, financial obligation, outstanding payments, amount due, money arising, dues, arrears and charges".

[20] Applying the plain meaning of the word, there is no doubt that the said judgment obtained by the respondent on 16 December 2009 being a monetary judgment, constitutes a debt ie, amount due from the appellant (insurer) to the respondent under s. 96(1) of the Road Transport Act 1987. The respondent may recover the said sum from the appellant by serving a statutory demand under s. 218(2)(a) of the Companies Act 1965.

[21] *Nowhere does s. 96(1) of the Road Transport Act 1987 say that the respondent must first obtain another judgment against the appellant before she can proceed to enforce the judgment earlier obtained by the respondent against the insured. Therefore, the question of the respondent having to file a recovery proceedings under s. 96(1) against the appellant, as contended by the appellant in its memorandum of appeal, does not arise at all. In short, the respondent, who had obtained a monetary judgment against the insured which has not been stayed, has the right under s. 96(1) to enforce the said judgment against the insurer without having to first file a recovery proceedings against the insurer.*

[22] *The status of the judgment on the insurer under s. 96(1) of the Road Transport Act 1987 is the same with status of the said judgment on the insured earlier granted in favour of the respondent. Unless set aside or stayed by proper authority, the said judgment remains.* Upon the respondent obtaining the judgment against the insured, the debt ceased to be a disputed debt. Thereafter the question whether the debt or amount due was *bona fide* disputed became non-issue. This is so even though the appellant had filed an appeal against the said judgment because the filing of an appeal does not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained. The filing of an appeal does not make a valid and enforceable judgment a disputed debt. (see: *SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd* [2002] 2 CLJ 329).

[23] In the instant case, the respondent has the right to proceed to issue a statutory notice under s. 218(2)(a) of the Companies Act 1965. Upon the expiration of the 21 days period as set out in the statutory notice and the amount claimed remaining unpaid, the debt becomes 'due and payable' and the appellant as the insurer is deemed to be unable to pay

its debts. Consequently, the respondent acquires the status of 'creditor' for the purpose of winding up proceedings under s. 217(1)(h) and 218(1)(e) of the Companies Act 1965.

[24] *The right of the respondent to initiate winding-up proceedings against the appellant in this case, is a substantive right conferred by substantive law ie, s. 96(1) of the Road Transport Act 1987, read together with ss. 217(1)(b); 218(1)(e) and 218(2) of the Companies Act 1965. Neither procedural law nor inherent jurisdiction of the court can deprive the respondent of that right. The proper exercise of that right by the respondent by issuing the 218 notice as in the present case, cannot amount to an abuse of court process. (see: R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147).

(emphasis added).

It is to be noted that *Muniammah* has been decided before the introduction of s. 195 FSA. I will discuss later in this judgment that upon the introduction of s. 195 FSA, part of the judgment in *Muniammah* regarding the issuance of a s. 218(2)(a) notice to an insurance company based on a judgment against the insured, may no longer be applicable.

[62] In *Letchumanan*, at pp. 875-876 (CLJ); p. 546-547 (MLJ), Abdull Hamid Embong JCA (as he then was) decided as follows:

[14] The second issue raises a point of law which may be stated in this manner:

Whether in the recovery action the question of liability of the tortfeasor which has been determined in the liability action may still be raised and argued to entitle the insurer to refuse satisfying the judgment.

…

[20] *It is our view that the liability and recovery actions are distinct from each other. The former is a claim founded on tort whereas the latter is based on a statutory right provided under the provisions of the RTA. For this reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue at the recovery action stage.*

[21] *In the liability action, the issue before the court would be to determine negligence whereas in the recovery action the issues include the construction of the terms in the insurance policy and the application of ss. 91 and 96 of the RTA. It is upon this construction of the insurance policy that the insurers raised for the first time in the recovery action. In this appeal, P&O, as the insurers is thus seeking to declare that the policy as against the deceased, is unenforceable due to the exception in its terms. This issue remains alive and was brought up on appeal to the High Court and now before us.*

(emphasis added).

[63] In *Kamacheh*, at pp. 62, 63-64 and 68, Md Raus Sharif PCA held as follows:

> [16] At the outset we would like to state here that *the central issue for determination in this appeal is ie, whether the insurer (appellant) in the instant case ought to be held liable to pay to the third party (respondent) whose injuries had been caused by the criminal use of the vehicle by the insured*. Simply put, whether the use of the insured vehicle would cover the use of the same in a criminal act.
>
> [17] *The right of the respondent as a third party to approach the court for redress against the appellant, who itself is not a tortfeasor and with whom the respondent had no contractual relationship arises from statutory empowerment under s. 96 of the RTA 1987. The mechanism of s. 96 of the RTA 1987 operates thus: there is a statutory obligation created by s. 96 of the RTA 1987 on the part of the insurer (appellant) on being so notified on the failure of the insured to pay up the judgment sum that the insured had failed to be satisfied in favour of the third party. This duty to pay up is statutory in origin and as said earlier is an exception to the concept founded upon privity of contract*.
>
> [18] *In order for the respondent to succeed in her claim under s. 96 of the RTA 1987 the requirements in respect of the insurance policy under s. 91(1) of the RTA must be fulfilled first. Section 91(1) of the RTA 1987 sets down the requirements in respect of policies*, …
>
> [20] In short, the appellant's bone of contention is that the criminal act of the insured is not something caused by or arising out of the use of the motor vehicle. Learned counsel referred to the following cases of *Herbert v. Railway Passengers Assurance Co* [1938] 1 All ER 650, *Letchumi & Anor v. The Asia Insurance Co Ltd* [1972] 1 LNS 74, *Ramlah Abdullah v. Talasco Insurance Sdn Bhd & Anor* [2009] 3 CLJ 620, *Ahmad Sandara Lela Putera & Anor v. Queensland Insurance Co Ltd* [1974] 1 LNS 4 and *Tan Keng Hong & Anor v. Fatimah Abdullah & Ors* [1974] 1 LNS 166 in support of his proposition.
>
> [21] *Learned counsel for the respondent took a diametrically opposed view on this issue in that the policy of insurance issued under s. 91 of the RTA covers criminal use of the motor vehicle within the words "arising out of the use of the motor vehicle" under s. 91(1)(b) of the RTA 1987. Learned counsel contended that the statutory provisions of s. 91(1) is clear as it imposes upon the appellant being the insurer the obligation of paying of the person who had obtained a judgment against the insured. Hence, learned counsel submitted that the appellant in this present appeal is obliged to pay the respondent who had obtained judgment against the insured*.
>
> [22] *After giving our utmost consideration to the issue above, with the greatest of respect we are unable to accede to the contentions urged upon us by learned counsel for the appellant. We are much inclined to agree with the proposition urged upon us by learned counsel for the respondent. Our reasons are thus: The pertinent words under s. 91(1)(b) would be, "any liability which may be incurred … in respect of death of or bodily injury … caused by or arising out of the use of the motor vehicle*". (emphasis added)

[23] *The crucial question here is whether the respondent's injuries were "caused by or arising out of" the use of the vehicle by the insured. If they were, the appellant is obliged by s. 96 of the RTA 1987 to satisfy the judgment obtained against the insured. …*

[38] *Perhaps it would be opportune for us to also highlight here that it is the insurer's mandatory duty to satisfy the judgment. The statutory provision of s. 96(1) of the RTA 1987 is very clear. It imposes upon the insurer (the appellant, in this appeal) the obligation of paying to the person who had obtained a judgment against the insured, after a certificate of insurance had been duly delivered to the person by whom the policy is affected in respect of any third party risk covered under the policy. In short, the appellant in the present appeal is obliged statutorily to pay the respondent who had obtained the judgment dated 15 March 2011 against the insured.*

[39] *The appellant as the insurer would only be able to avoid the payment obligation under the circumstances and conditions mentioned in sub-ss. 2 and 3 of s. 96 of the RTA 1987, that is to say, where the requisite notice of the proceedings was not given to the insurer before the commencement of the proceedings; where there is a stay of the judgment pending appeal; where the policy of insurance respecting the liability had been cancelled; and where the insurer had obtained a declaration from the court that the insurance was void or unenforceable.*

(emphasis added).

[64] Based on the above Court of Appeal cases, an insurer's statutory liability arises wherein an insurer is legally bound under s. 96(1) RTA to pay a person who has died or who has suffered bodily injury in a motor accident (victim) if all of the following conditions are fulfilled:

(a) the insurer has issued an insurance policy to a policy holder (s. 91(1)(a) RTA) (first condition) - *Kamacheh*;

(b) a certificate of insurance in the prescribed form and which contains prescribed particulars has been delivered by the insurer to the policy holder (s. 91(4) RTA) (second condition) - *Muniammah* and *Kamacheh*;

(c) the insured is a "person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road" (s. 91(1)(b) RTA) (third condition) - *Kamacheh*;

(d) the insured has caused death or bodily injury to the victim by or arising out of the use of a motor vehicle (s. 91(1)(b) RTA) (fourth condition);

(e) the victim has filed a liability suit against the insured in respect of liability covered by an insurance policy under s. 91(1)(b) RTA (s. 96(1) RTA) (fifth condition);

(f) before or within seven days after the commencement of the liability suit, the insurer has notice of the liability suit (s. 96(2)(a) RTA) (sixth condition) - *Muniammah* and *Kamacheh*;

(g) the victim has obtained a judgment against the insured in the liability suit (s. 96(1) RTA) (seventh condition) - *Muniammah* and *Kamacheh*. In the Court of Appeal case of *Ramli Samad v. Pacific & Orient Insurance Co Sdn Bhd* [2010] 1 CLJ 970; [2010] 3 MLJ 23, at 992 (CLJ); 41-42 (MLJ), Abdul Malik Ishak JCA held as follows:

> [61] *Finally, an insurance company like Pacific & Orient Insurance Co Sdn Bhd only indemnifies the insured like the second defendant employer when there is a judgment against the insured. Here, since no judgment was obtained against the second defendant employer as the insured, there is nothing for the insurer to indemnify. The duty of an insurer to satisfy judgment is set out in s. 96(1) [RTA] …*
>
> …
>
> [62] **Thus, any action against *Pacific & Orient Insurance Co Sdn Bhd* - the respondent herein, must be dismissed forthwith**.
>
> (emphasis added).

If the victim has obtained a judgment in the liability suit against the insured, the victim need not file a recovery suit and obtain judgment against the insurer in the recovery suit - *Muniammah*; and

(h) non-existence of any of the circumstances stated in s. 96(2)(b), (c) and (3) RTA (eighth condition) - *Muniammah* and *Kamacheh*.

Did Seremban Case Concern Plaintiff As An Insurer For Lorry No. BBG 1038?

[65] The fifth condition (provided in s. 96(1) RTA) requires a liability suit to be filed wherein a "judgment in respect of any such liability as is required to be covered by a policy under para. 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy". In my view, the fifth condition requires a liability suit to be filed regarding an insurer's liability in respect of, among others, the correct motor vehicle which has been insured by the insurer. If a liability suit is filed regarding a motor vehicle which has not been insured by the insurer, the insurer's statutory liability under ss. 91 and 96 RTA, cannot arise.

[66] The SOC in Seremban case had pleaded that the lorry driven by Mr Ang at the time of the accident, had the registration number BBG 1083. The first Seremban High Court's judgment had refused leave for the defendants to amend the SOC in Seremban case in respect of the registration number of the lorry driven by Mr Ang at the time of the accident. The first Seremban High Court's judgment had been affirmed by the Court of Appeal's decision (first Seremban High Court's judgment). This means the first Seremban High Court's judgment is final and *res judicata*.

[67] The *res judicata* doctrine has two limbs, namely cause of action estoppel and issue estoppel. The *res judicata* doctrine has been explained by Peh Swee Chin FCJ in the Supreme Court case of *Asia Commercial Finance (M) Bhd*, at pp. 791-793 (CLJ); pp. 197-198, 198-199 and 199-200 (MLJ), as follows:

> *What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel per rem judicatum. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; res judicata pro veritate accipitur. The public policy of the law is that, it is in the public interest that there should be finality in litigation* - interest *rei publicae ut sit finis litium*. **It is only just that no one ought to be vexed twice for the same cause of action** - *nemo debet bis vexari proeadem causa*. **Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy**.
>
> …
>
> *Thus, there are in fact two kinds of estoppel per rem judicatum. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.*
>
> *The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action, ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.*
>
> *In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel per rem judicatum and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence.*
>
> *On the other hand, the issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision. …*
>
> (emphasis added).

Based on issue estoppel principle, the second limb of *res judicata* doctrine, as enunciated in *Asia Commercial Finance (M) Bhd*:

(a) the defendants are bound by the Court of Appeal's decision (first Seremban High Court's judgment) and first Seremban High Court's judgment regarding the fact that the Seremban case only concerned a lorry with the registration number BBG 1083; and

(b) the defendants are barred from contending that the Seremban case concerned lorry with the registration number BBG 1038.

[68] For the reasons given above, the Seremban case was not a liability suit which concerned the plaintiff because the plaintiff did not insure lorry with the registration number BBG 1083. As the fifth condition has not been satisfied in this case, NCC 4 court does not have the jurisdiction under s. 41 SRA to grant the declaratory orders in paras. 1 to 3. I will discuss subsequently in this judgment regarding the scope of s. 41 SRA.

Did Plaintiff Have Notice Of Seremban Case Under s. 96(2)(a) RTA?

[69] The sixth condition (provided in s. 96(2)(a) RTA) required the plaintiff to have notice of the Seremban case before or within seven days after the commencement of the Seremban case.

[70] The defendants relied on Messrs KS's letter dated 5 March 1986 to contend that the plaintiff had notice of the Seremban case. With respect, I am not able to accede to this contention because Messrs KS's letter dated 5 March 1986 had referred to the lorry with the registration number BBG 1083 which was not insured by the plaintiff. In my opinion, the notice envisaged by s. 96(2)(a) RTA should contain correct particulars regarding, among others, the registration number of the vehicle in question. The need for such a correct particular in a notice to be given to the insurer under s. 96(2)(a) RTA, is to assist the insurer to make an informed decision in respect of the liability suit. It is to be noted that the insurer's statutory liability arises under s. 96 RTA even if no recovery suit has been filed against the insurer - *Muniammah*.

[71] I have not overlooked the plaintiff's letter dated 6 November 1985 to Messrs KS (plaintiff's letter dated 6 November 1985). I cannot consider the contents of plaintiff's letter dated 6 November 1985 because plaintiff's letter dated 6 November 1985 is not only marked "without prejudice" but has also expressly stated that the plaintiff's request in plaintiff's letter dated 6 November 1985 "is made without prejudice or admission of liability".

[72] Based on the aforesaid, the sixth condition has not been satisfied. Consequently, the insurer's statutory liability cannot arise and NCC 4 court does not possess the jurisdiction under s. 41 SRA to make the declaratory orders in paras. 1 to 3.

Effect Of Dismissal Of Recovery Suit

[73] As explained above, if all the above eight conditions of an insurer's statutory liability (eight conditions) have been satisfied, the victim may claim for the judgment sum (obtained by the victim against the insured in a liability suit) from the insurer under s. 96(1) RTA without the need for the victim to file a recovery suit against the insurer - *Muniammah*.

[74] If one or more of the eight conditions has or have not been complied with, the insurer is entitled to dispute the judgment obtained by the victim in the liability suit. In such an event, the victim has to file a recovery suit against the insurer. This is what has happened in this case. The defendants filed a recovery suit against the plaintiff when the defendants launched KL Sessions Court suit.

[75] By way of the KL Sessions Court's judgment, the defendants' recovery suit has been dismissed with costs. The defendants' failure to proceed with an appeal to the High Court against the KL Sessions Court's judgment, means that the KL Sessions Court's judgment is final and *res judicata* according to *Asia Commercial Finance (M) Bhd*. A final KL Sessions Court's judgment has two important consequences as follows:

(a) the plaintiff cannot be liable to the defendants for the Seremban Sessions Court's judgment and/or the second Seremban High Court's judgment. Accordingly, NCC 4 court does not have the jurisdiction under s. 41 SRA to make the declaratory orders in paras. 1 to 3; and

(b) a final KL Sessions Court's judgment is *res judicata* and cannot be challenged, varied or re-visited, by way of the KLHC suit or by any other subsequent action which may be filed by the defendants. Based on *Asia Commercial Finance (M) Bhd*, the defendants are bound by the KL Sessions Court's judgment and are barred by cause of action estoppel principle, the second limb of *res judicata* doctrine, from filing KLHC suit to re-visit KL Sessions Court's judgment. In view of the final KL Sessions Court's judgment, the KLHC suit constitutes an abuse of court process by the defendants.

Could NCC 4 Court Grant Declarations Under s. 41 SRA and O. 15 r. 16 RC?

[76] Section 41 SRA provides as follows:

> Discretion of court as to declaration of status or right
>
> 41. *Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief*:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
>
> (emphasis added).

[77] Order 15 r. 16 RC states as follows:

> Declaratory judgment (Order 15 rule 16)
>
> No action or other proceeding shall be open to objection merely on the ground that a declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

[78] Our apex courts have decided in the following cases that an applicant for declaratory relief under s. 41 SRA, should first show that he or she is "entitled to any legal character, or to any right as to any property":

(a) in *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29, at 31-32, Raja Azlan Shah Ag LP (in the majority of the Federal Court's decision) (as His Royal Highness then was) held as follows:

> *My first observation is that judges should adjudicate on such matters as the present with restraint and certainly not to emulate the quasi-legislative role of the United States Supreme Court. The power to grant a declaration should be exercised with a proper sense of responsibility and after a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that properly call for their making. (See Ibeneweka v. Egbuna* [1964] 1 WLR 219, 225.
>
> *What perhaps stands out about declaratory relief is the wide range of circumstances in which the procedure has been invoked already and the wide variety of cases in terms of subject matter where this type of proceedings has been used. It has now become a regular feature of litigation and Lord Denning was probably only anticipating a little when he said in Pyx Granite Co Ltd v. Ministry of Housing and Local Government* [1958] 1 QB 554, 571 that:
>
> > The wide scope of it can be seen from the speech of Viscount Kilmuir L.C. in (*Vine v. National Dock Labour Board* [1957] AC 468, 498) from which it appears that if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.
> >
> > (emphasis added).

Dato Menteri Othman bin Baginda concerns the interpretation of the Federal Constitution and the Negeri Sembilan State Constitution. It is to be noted that the Federal Court decided *Dato Menteri Othman bin Baginda* as our apex court because by then, appeals to the Privy Council in respect of constitutional and criminal matters have already been abolished by the Courts of Judicature (Amendment) Act 1976 (Act A328); and

(b) in *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, at p. 87 (CLJ); p. 41 (MLJ), Hashim Yeop Sani SCJ (as he then was) decided as follows in the majority decision of the Supreme Court:

> No doubt, section 41 of our Specific Relief Act 1950 is an old provision and may even be regarded as antiquated but it is still in the statute book as part of our law. In the Specific Relief Act, section 41 comes under the chapter "Declaratory Decrees" and deals with persons seeking declarations of status or right from the court.
>
> …
>
> *Section 41 does not sanction every form of declaration but only a declaration that the plaintiff is entitled to a specific legal character or to any right as to property. Therefore any person who has "a right to any legal character" may bring an action against anyone who denies that right. The prerequisite for such a declaratory action is that the plaintiff must first establish that he qualifies as a person entitled to any legal character or to any right as to any property. The legal character or the right must exist at the time the action is instituted.*
>
> (emphasis added).

[79] As explained in the above paras. 65 to 75, the insurer's statutory liability cannot arise in this case, especially in view of the dismissal of the recovery suit. Accordingly, the defendants are not "entitled to any legal character, or to any right as to any property" within the meaning of s. 41 SRA and NCC 4 court therefore has no jurisdiction to grant the declaratory orders in paras. 1 to 3.

[80] When a party is not "entitled to any legal character, or to any right as to any property" under s. 41 SRA, I am of the opinion that O. 15 r. 16 RC cannot confer jurisdiction on a High Court to grant a declaration. My view is premised on the following reasons:

(a) Order 15 r. 16 RC does not provide the High Court with jurisdiction to grant declaratory orders despite the fact that a plaintiff is not "entitled to any legal character, or to any right as to any property" within the meaning of s. 41 SRA; and

(b) if contrary to the above interpretation, O. 15 r. 16 RC is construed so widely so as to confer jurisdiction on the High Court to give declarations notwithstanding the fact that a plaintiff is not "entitled to any legal character, or to any right as to any property" within the meaning of s. 41 SRA, such an inconsistency between O. 15 r. 16 RC and s. 41 SRA will attract the application of s. 23(1) IA (1948 & 1967). As elaborated above, pursuant to s. 23(1) IA (1948 & 1967), O. 15 r. 16 RC "shall be void to the extent of the inconsistency" with s. 41 SRA.

A *Can High Court Grant A Monetary Judgment Ancillary To A Declaration*?

[81] In *Takako Sakao v. Ng Pek Yuen & Anor (No 3)* [2010] 1 CLJ 429; [2010] 2 MLJ 141, at pp. 436-437 (CLJ); p. 148 (MLJ), Gopal Sri Ram FCJ delivered the following judgment of the Federal Court:

B [6] *There is an added point in so far as staying the effect of the principal judgment is concerned. All that judgment does, inter alia, is to hold that the appellant is a beneficiary under a constructive trust of which the second respondent is a trustee. In short it declares the existence of a constructive trust. It makes no positive order. The weakness of the remedy of declaration lies in the want of its enforceability. A declaration cannot be enforced by execution*. In *Prakash Chand v. SS Grewal* (1975)
C Cri LJ 679, the court held as follows:

> *A declaratory decree cannot be executed as it only declares the rights of the decree-holder qua the judgement-debtor and does not, in terms, direct the judgement-debtor to do or to refrain from doing any particular act or things. Since there is no command issued to the judgment-debtor to obey, the civil*
D *process cannot be issued for the compliance of that mandate or command.*

In other words, there can be no committal or other execution process issued to enforce a declaration. Since a declaration cannot be enforced, no question of staying it may arise.

(emphasis added).

E **[82]** In *Maziah Musa v. Dato' Zainulabidin Mat Akhir & Ors* [2014] 1 LNS 1034; [2014] 5 AMR 793, at 798-799, I decided as follows:

[9] *I am of the view that a declaratory order cannot be executed and hence, the question of a stay of execution of a declaration does not arise. I rely on two Indian cases as follows*:

F (a) *in Prakash Chand v. SS Grewal & Ors [1975] Cri LJ 679 at 684, the Full Bench of the Punjab and Haryana High Court held as follows:*

> *A declaratory decree … cannot be executed as it only declares the rights of the decree-holder qua the judgment debtor, and does not in terms, direct the judgment debtor to do or to refrain from doing any particular act or*
G *thing. Since there is no command issued to the judgment debtor to obey, the civil process cannot be issued for the compliance of that mandate or command.*

(emphasis added); and

H (b) *Prakash Chand has been affirmed by the Indian Supreme Court in State of Madhya Pradesh v. Mangilal Sharma* AIR 1998 SC 743, at 746.

[10] *In respect of declaratory orders, Indian cases are highly persuasive as Part 2, Chapter 6 (ss 41 and 42) of our Specific Relief Act 1950 ("SRA") which provides for declaratory decrees, is based on the Indian Specific Relief Act 1877 (now the*
I *Indian Specific Relief Act 1963).*

(emphasis added)

[83] It is clear from *Takako Sakao (No 3)* and *Maziah binti Musa* that a declaration cannot be enforced. In this case, as discussed above, NCC 4 court has no jurisdiction to grant declaratory orders in paras. 1 to 3. A *fortiori*, NCC 4 court has no jurisdiction to grant ancillary monetary judgments in paras. 4 to 6 to compel the plaintiff to pay the defendants per paras. 4 to 6.

Jurisdictional Challenge

[84] In view of the above reasons, I find that the jurisdictional challenge is successful in this case. Consequently, I allow the declarations prayed for the plaintiff in prayers (d), (g) and (h).

"*Fortuna* injunction"

[85] In *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305, at 313-315, Gopal Sri Ram JCA (as he then was) decided as follows in the Court of Appeal:

> [7] *When a court exercises its discretion to issue an injunction to restrain the presentation of a winding up, it exercises its inherent jurisdiction. It does so in order to prevent an abuse of its process. In Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia* [1978] VR 83, McGarvie J put the point as follows:
>
> > *When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process. Mann v. Goldsteing [1968] 1 WLR 1091, at pp. 1093-4; [1968] 2 All ER 769. Usually a court acts against abuse of its process after proceedings have been commenced. Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in the proceedings may be struck out. This is done to relieve a party to the proceedings from an oppressive and damaging situation in which he has been placed through abuse of court process. The law has long recognised that with proceedings to wind up a company, intervention after the commencement of proceedings would often be too late to relieve the company of oppression and damage. The courts have recognised that irreparable damage may be done to a company merely through public knowledge of the presentation of a petition. Usually the damage flows from the loss of commercial reputation which results. The courts have also been conscious of the pressure which may be put on a company, by a person with a disputed claim against it, threatening to present a winding up petition unless the company meets his claim. While that threat exists, the company, in order to avoid the damage involved in the presentation of a petition, is pressed to meet the claim although it may have substantial and genuine grounds for regarding itself as not required to do so.*
>
> *The decisions of the courts have established the principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court*. The courts apply this principle similarly to restrain the advertisement of a petition already presented. The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court process.

A [8] *When deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds* (see *Stonegate Securities Ltd v. Gregory* [1980] 1 All ER 241). It is not enough that there is a serious question to be tried. In other words, this is one of those cases to which the general test laid down in *American Cynamid Co v. Ethicon Ltd* [1975] AC 396 does not apply.
B In *Molop Corp Sdn Bhd v. Uniperkasa (M) Sdn Bhd* [2003] 6 MLJ 311 Low Hop Bing J (as he then was) correctly held as follows:

> In *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory
C injunction to restrain the presentation of a winding up petition, in the following words: I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof cast on the plaintiff is
D only discharged by reference to the standard of proof or test in adducing evidence to establish a *prima facie* case and that the principle relating to the test of "serious question to be tried" in *American Cynamid Co v. Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 is not applicable as the applications
E there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me.
>
> (emphasis added).

[86] Sections 50 and 51 SRA provide as follows:

F Preventive relief how granted

50 **Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual**.

Temporary and perpetual injunctions

G 51(1) **Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure**.

(2) **A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby**
H **perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff**.

(emphasis added).

I

[87] I am of the respectful view that ss. 50, 51(1) and (2) SRA confers statutory jurisdiction on our courts to grant "*fortuna* injunctions", be it "temporary" (interlocutory) or "perpetual" (permanent). In *RHB Bank Bhd v. Gunasingam Ramasingam* [2002] 5 CLJ 544, at 550 (*Gunasingam*), Kang Hwee Ghee J (as he then was) decided as follows in the High Court:

> *The power of the High Court to grant an injunction to restrain a petitioner from presenting a winding up petition is described by Stephenson LJ in Bryanston Finance Ltd v. De Vires No. 2 Ch 63 at 79C as "a facet of its inherent jurisdiction to prevent an abuse of its process". Here in our jurisdiction that power is not merely inherent but provided in clear terms in s. 50 of the Specific Relief Act 1950.*
>
> (emphasis added).

Effect of s. 195 FSA

[88] Sections 191, 195, 254(1) and 268 FSA read as follows:

> Interpretation
>
> 191 For the purposes of this Division:
>
> "institution" refers to a licensed person or an operator of a designated payment system; …
>
> **Winding up by High Court on application by persons other than Bank**
>
> 195(1) **No application for the winding up of an institution or approved person may be presented to the High Court by any person without the prior written approval of the Bank.**
>
> (2) Subject to subsection (1), where an application for the winding up of an institution or approved person is presented to the High Court by a person other than the Bank:
>
> (a) that person shall deliver a copy of the application to the Bank at the same time as it is presented; and
>
> (b) the Bank shall be party to the winding up proceedings and shall be entitled to appear and be heard in all proceedings relating to the application and to call, examine and cross-examine any witness.
>
> (3) **Any person who contravenes subsection (1) or paragraph (2)(a) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million ringgit or to both.**
>
> Attempts, abetments and conspiracies
>
> 254(1) **Any person who:**
>
> (a) **attempts to commit an offence under this Act;**
>
> (b) **does an act preparatory to, or in furtherance of, the commission of an offence under this Act; or**
>
> (c) abets or is engaged in a criminal conspiracy to commit (as those terms are defined in the Penal Code) an offence under this Act, whether or not the offence is committed in consequence of it,

commits an offence and is liable to the penalty for that offence.

Application of Companies Act 1965

268 Where an authorised person, a registered person, an operator of a designated payment system or a person prescribed as a prescribed financial institution under section 212 is a corporation to which all or any of the provisions of the Companies Act 1965 apply, such provisions shall be in addition to the provisions of this Act and not in derogation thereof, but **where there is any conflict or inconsistency between the provisions of the Companies Act 1965 and this Act in their respective application to the person or operator, the provisions of this Act shall prevail**.

(emphasis added).

[89] The word "bank" in s. 195 FSA means BNM according to the definition of the word "bank" in s. 2(1) FSA (which refers to s. 2(1) of the Central Bank of Malaysia Act 2009).

[90] It is not disputed that the plaintiff is an "institution" (defined in s. 191 FSA) to which s. 195 FSA applies.

[91] According to s. 195(1) FSA, no winding up petition can be presented against an "institution" such as the plaintiff, without BNM's prior written approval. Any breach of s. 195(1) FSA constitutes an offence which may be punished up to a maximum of five years' imprisonment and/or a maximum fine of RM10 million (s. 195(3) FSA).

[92] Section 254(1)(a) FSA provides that any attempt to commit an offence under, among others, s. 195(1) FSA, is in itself an offence which is punishable with the same punishment as provided in s. 195(3) FSA. Furthermore, according to s. 254(1)(b) FSA, "an act preparatory to, or in furtherance of, the commission of an offence" under s. 195(1) FSA, constitutes an offence which is punishable with the penalty provided in s. 195(3) FSA.

[93] FSA has repealed, among others, the Insurance Act 1996 (IA (1996)) - s. 271 FSA. IA (1996) has no provision equivalent to s. 195 FSA.

[94] Section 268 FSA applies to, among others, an "authorised person" (defined in s. 2(1) FSA as a "person licensed under s. 10 or approved under s. 11 to carry on an authorised business"). The plaintiff is licensed to carry on "insurance business" under s. 10(4) FSA. Hence, the plaintiff is an "authorised person" for the purpose of FSA.

[95] If there is a conflict between s. 195 FSA with ss. 217 to 240 CA (regarding High Court's power to wind up companies), s. 268 FSA has provided that s. 195 FSA "shall prevail" over provisions in CA.

[96] I am of the view that the purpose of s. 195 FSA is to maintain public confidence in "institutions", including insurance companies. If any person can present a winding up petition against an insurance company without

BNM's prior written approval, this may generally erode public confidence in insurance companies and specifically cause irreparable harm to the insurance company in question.

[97] With the introduction of ss. 195 and 268 FSA, part of the judgment in *Muniammah* regarding the right of a judgment creditor to present a winding up petition against an insurance company, is not applicable now.

[98] In this case, the defendants have not even applied for, let alone obtain, BNM's prior written approval to present a winding up petition against the plaintiff. Yet, s. 218(2)(a) notice had been sent to the plaintiff by way of Messrs AS's letter dated 19 March 2015. Messrs VKA's letter dated 25 March 2015 drew the attention of the defendants' solicitors to s. 195(1) and (3) FSA. By way of Messrs AS's letter dated 27 March 2015, the defendants' solicitors stated that the defendants were "disinclined to withdraw" the s. 218(2)(a) notice and even contended that s. 195(1) FSA "is at variance" with s. 112(2) IA (1996).

[99] Section 112 IA (1996) reads as follows:

> 112(1) The Bank may present a petition to the Court for the winding up of a local insurer, and in the case of a foreign insurer for the winding up of its business in Malaysia, whether or not its licence has been revoked.
>
> (2) Where a petition for the winding up of an insurer by the Court is presented by a person other than the Bank, that person, at the same time as it is presented, shall deliver to the Bank a copy of the petition.
>
> (3) The Bank shall be entitled to appear and be heard in all proceedings relating to the petition and to call, examine and cross-examine any witness.
>
> (4) The Bank, if it considers fit, may support or oppose the petition.

[100] As explained above, s. 112 IA (1996) has been repealed by s. 271 FSA. As such, s. 112 IA (1996) cannot be the lawful basis for the service of the s. 218(2)(a) notice to the plaintiff.

[101] In my view, the s. 218(2)(a) notice together with Messrs AS's letters dated 19 March 2015 and 27 March 2015, constitute:

(a) an attempt under s. 254(1)(a) FSA to commit an offence under s. 195(1) FSA; and/or

(b) an act preparatory to, or in furtherance of, the commission of an offence under s. 195(1) FSA within the meaning of s. 254(1)(b) FSA.

[102] Premised on the above reasons, I have no hesitation to grant the following orders in the plaintiff's favour:

(a) a "*fortuna* injunction" as prayed for in prayer (a); and

(b) declarations as per prayers (c), (e) and (f).

As the defendants have not filed a winding up petition against the plaintiff, prayer (b) is not necessary.

Plaintiff Has Secured Or Compounded Demanded Sum Under s. 218(2)(a) CA

[103] Section 218(2) CA provides as follows:

> 218(2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and **the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor**; ...
>
> (emphasis added).

[104] If the plaintiff has secured or compounded the demanded sum to the "reasonable satisfaction" of the defendants as provided in s. 218(2)(a) CA, the defendants cannot present a winding up petition against the plaintiff based on the demanded sum.

[105] In this case, it is not disputed that the plaintiff has paid the sum stated in KLHC's judgment together with interest and costs into the client account of the plaintiff's solicitors (plaintiff's payment into solicitor's client account). Once money has been paid into a client account of a solicitor, the Solicitors' Account Rules 1990 (SAR) shall apply. Money can only be withdrawn from a solicitor's client account as provided in rr. 7 and 8 SAR. I am satisfied that the plaintiff's payment into solicitor's client account constitutes a security or a compounding of the demanded sum to the "reasonable satisfaction" of the defendants within the meaning of s. 218(2)(a) CA. My view is supported by the following cases:

(a) in *Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors* [2011] 5 CLJ 481; [2011] 5 MLJ 521, the respondents had presented a winding up petition against the appellant company based on a sum to be paid by the appellant company under a consent order. The appellant company paid the judgment sum into court but the respondents refused to accept payment and proceeded with the winding up petition. The Federal Court in two judgments delivered by Zaki CJ and Zulkefli FCJ (as he then was) struck out the winding up petition. There is no real difference between payment into court of the sum claimed by a petitioner and payment of that sum into a solicitor's client account except that interest may be earned on a solicitor's client account. If the defendants have filed a winding up petition against the plaintiff based on the demanded sum despite the plaintiff's payment into solicitor's client account, the plaintiff would be entitled to strike out the petition based on *Blue Valley Plantations Bhd*;

(b) in *Gunasingam*, the defendant had obtained a judgment in default of appearance against the plaintiff bank. The plaintiff bank applied to set aside the default judgment (setting aside application). The plaintiff bank's solicitors wrote a letter to the defendant to inform the defendant that the plaintiff bank would pay the judgment sum into court pending the disposal of the setting aside application and requested a written confirmation that the defendant would not execute or serve a s. 218(2)(a) notice based on the default judgment. As the defendant did not reply to this letter, the plaintiff bank applied to the High Court for an injunction to restrain the defendant from serving a s. 218(2)(a) notice on the plaintiff bank based on the default judgment. This application was allowed by Kang Hwee Ghee J (as he then was) as follows, at pp. 548, 549 and 550:

> It is true the defendant did not indicate anywhere that he is not going to serve the s. 218 notice with a view to commence winding up of the plaintiff. **But he had also not replied to the plaintiff's letter (exh. A-6 encl. 3) seeking a confirmation from him that he will not serve the s. 218 notice on the plaintiff pending its payment into court of the judgment sum of RM803,271.46, obtained by him**. Neither did the defendant deny in his affidavit that he would serve a s. 218 notice and commence a winding up proceeding against the plaintiff. *It would therefore be perfectly legitimate for the plaintiff to assume that its right to operate its banking business is being threatened by the likelihood of the commencement of a winding up proceeding that would adversely affect its operation as a bank. That threat is sufficient for the plaintiff to apply for the injunctive reliefs.*
>
> …
>
> I *will have to accept as true and accurate that the plaintiff's bank is not insolvent. The fact that its manager, Mohamed Din Dato' Seri Hamidi has committed himself to deposit a cheque for the judgment sum of RM803,496.46 pending the decision of the court on its application to set aside the judgment in default of appearance (which it had filed on 26 April 2000), reinforces its capability to do so. I have not the slightest doubt that the plaintiff is able to pay its debts.*
>
> …
>
> *I will have to accept the plaintiff's manager's averment that the service of the statutory notice under s. 218 of the Companies Act 1965 will adversely affect its banking operations involving some 182 branches in Malaysia with an aggregate deposits of some RM34 billion and that it may cause a run on the bank in consequence of which the whole banking industry may be affected.*
>
> **The effect that a winding up petition may bring to a company particularly a bank is obvious**. …
>
> (emphasis added); and

(c) in an unreported judgment by Anantham Kasinather J (as he then was) in *Pacific & Orient Insurance Co Bhd v. Zakaria Haji Salleh* [2011] 1 LNS 299, High Court Civil Suit No. D-24-NCC-442-2010, a "*fortuna* injunction" was granted to a judgment debtor who had deposited the judgment sum with all accrued interest into the account of the judgment debtor's solicitors with an undertaking by the judgment debtor's solicitors to pay the sum if the judgment debtor's appeal to the Court of Appeal was subsequently dismissed. Anantham Kasinather J's decision in this case has been upheld by the Court of Appeal but there is no written judgment by the Court of Appeal.

[106] In view of the plaintiff's payment into solicitor's client account, prayers (i) and (j) should be allowed.

Demanded Sum Is *Bona Fide* Disputed On Substantial Grounds

[107] If a debt is *bona fide* disputed on substantial grounds, the claimant of the debt cannot present a winding up petition against the alleged debtor. This is clear from, among others, the following two Court of Appeal cases:

(a) *Tan Kok Tong*; and

(b) the majority judgment of Suriyadi JCA (as he then was) (concurred by Azhar Hj Ma'ah JCA) in *Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd* [2010] 2 CLJ 541; [2010] 3 MLJ 459, at 479.

[108] As elaborated in the above paras. 65 to 75, the plaintiff is not liable to the defendants under the Seremban Sessions Court's judgment and/or the second Seremban High Court's judgment. As such, the demanded sum claimed by the defendants is *bona fide* disputed on substantial grounds by the plaintiff. On this ground too, the plaintiff is entitled to a "*fortuna* injunction".

Plaintiff Is Commercially Solvent

[109] The demanded sum totalled only RM251,515. The plaintiff is an insurance company which is licensed under FSA to carry on "insurance business" under s. 10(4) FSA. The plaintiff would have presumably complied with all the capital adequacy and liquidity requirements of BNM. It is inconceivable for the plaintiff to be commercially insolvent. Even if a winding up petition is presented against the plaintiff, the petition is bound to fail because the petitioner as an on-going insurance company is commercially solvent. The plaintiff is thus entitled to a "*fortuna* injunction" on the strength of its commercial solvency.

Defendants Have Abused Court Process

[110] If the plaintiff is able to prove that the defendants' presentation of a winding up petition against the plaintiff constitutes a *prima facie* abuse of court process, the court will issue a "*fortuna* injunction" - *Westform Far East Sdn Bhd*, at pp. 474-475.

[111] As explained above, the defendants have been guilty of the following abuses of court process:

(a) as held in the first Seremban High Court's judgment, the defendants' solicitors had actual knowledge of the correct registration number of the lorry driven by Mr Ang at the time of the accident as early as 12 April 1994 (by way of a letter from the solicitors for the defendants in Seremban case to the solicitors for the plaintiffs in Seremban case). Despite being informed of the correct registration number of the lorry, the defendants proceeded with the trial in the Seremban case until the oral application was made during the case for the defendants in Seremban case. In my view, when a plaintiff files and prosecutes a claim with the actual knowledge that the accident in question actually concerns a lorry with a different registration number than that pleaded in the statement of claim, the plaintiff has abused court process; and

(b) the defendants' recovery suit had been dismissed *vide* KL Sessions Court's judgment and when KL Sessions Court's judgment became final and *res judicata* (after the defendants failed to proceed with an appeal to the High Court against KL Sessions Court's judgment), the defendants had abused court process by filing KLHC suit and by obtaining KLHC's judgment.

[112] With the above litany of abuses of court process by the defendants as a back-drop and in view of the plaintiff's *bona fide* disputes of the demanded sum on substantial grounds (please see the above paras. 65 to 75 and 107 to 108), I find that if the defendants file a winding up petition against the plaintiff based on the demanded sum, this will constitute a *prima facie* abuse of court process which necessitates the issuance of a "*fortuna* injunction".

Balance Of Convenience

[113] I have no hesitation to hold that the balance of convenience lies heavily in favour of the grant of a "*fortuna* injunction" in this case. My reasons are as follows:

(a) the issuance of a "*fortuna* injunction" will ensure compliance with s. 195(1) FSA;

(b) the plaintiff is an on-going insurance company which is not only commercially solvent but has also satisfied all of BNM's capital adequacy and liquidity requirements;

(c) the plaintiff's payment into solicitor's client account fortifies the plaintiff's commercial solvency;

(d) in view of the plaintiff's payment into solicitor's client account, if the Court of Appeal subsequently reverses this decision, the defendants need not worry that the plaintiff is unable to satisfy the demanded sum; and

A (e) if a "*fortuna* injunction" is not granted and a winding up petition is presented by the defendants against the plaintiff, this will cause grave and irreparable harm to the plaintiff in particular and will generally undermine public confidence in the insurance industry.

No Costs Should Be Awarded For Plaintiff

B

[114] Under O. 59 r. 3(2) RC, the court has discretion not to order "costs to follow the event". Order 59 r. 3(2) RC reads as follows:

> *If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*
>
> (emphasis added).

C

[115] An affidavit of service of the cause papers of KLHC suit has been filed in NCC 4 court. I cannot accept the excuse that the plaintiff could not attend KLHC suit because the plaintiff needed time to retrieve the relevant file and this case was an "old" matter. I decide as such because firstly, the plaintiff has successfully resisted the recovery suit on 25 June 2010. In other words, this matter is not as "old" as the plaintiff claims. Secondly, even if the plaintiff needed time to retrieve an "old" file, there is no reason why the plaintiff could not have instructed its solicitors to appear in NCC 4 court and to apply for reasonable time to defend the KLHC suit.

D

E

[116] Order 59 r. 8(b) RC allows the court to consider a party's conduct before and during proceedings, in deciding whether the court should award costs or otherwise in a case.

F

[117] I take the view that the plaintiff's absence in NCC 4 court has "directly contributed" to the making of KLHC's judgment. In view of such a conduct by the plaintiff, I exercise my discretion under O. 59 rr. 3(2) and 8(b) RC not to award costs in the plaintiff's favour in this case.

G **Summary Of Court's Order**

[118] Premised on the above reasons:

(a) prayer 1 of NA is granted;

(b) Prayers (a) and (c) to (j) of the OS are granted; and

H

(c) no order as to costs for both the NA and OS.

I